No. 21-2875

In The United States Court of Appeals for the Eighth Circuit

DYLAN BRANDT, et al.,

Plaintiffs-Appellees,

v.

LESLIE RUTLEDGE, ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Arkansas, No. 4:21-cv-00450-JM

Brief of Lambda Legal Defense and Education Fund, Inc., National Women's Law Center, and 20 Additional LGBTQ and Women's Rights Organizations as *Amici Curiae* in Support of Plaintiffs-Appellees and Affirmance

Gretchen Borchelt
Sunu Chandy
Dorianne Mason
Alison Tanner
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W., Suite 800
Washington, DC 20036
(202) 588-5180

Nicholas "Guilly" Guillory
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Ste. 500
Dallas, TX 75219
(214) 219-8585

Omar Gonzalez-Pagan
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

Karen Loewy
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006
(202) 804-6245

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel of record for *Amici Curiae* Lambda Legal Defense and Education Fund, Inc., National Women's Law Center, and 20 Additional LGBTQ and Women's Rights Organizations certifies that none of the *Amici Curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order so that the judges of this Court may evaluate possible disqualification or recusal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

Lindsay Mahowald, Sharita Gruberg, and John Halpin, Ctr. for Am. Progress, *The State of the LGBTQ Community in 2020 A National Public Opinion Study* (Oct. 2020), https://tinyurl.com/yc6vctku 17

Madeleine Carlisle, *Anti-Trans Violence and Rhetoric Reached Record Highs Across America in 2021*, TIME (Dec. 30, 2021), https://tinyurl.com/3dcpas6r 19

Nat'l Acad. of Sciences, Eng'g, and Med., *Understanding the Well-Being of LGBTQI+ Populations* (2020), at 12-10, https://doi.org/10.17226/25877 32

Priya Krishnakumar, *This record-breaking year for anti-transgender legislation would affect minors the most*, CNN.com (Apr. 15, 2021), https://tinyurl.com/3xun7z7x 19

Sam Levin, *Mapping the anti-trans laws sweeping America: 'A war on 100 fronts'*, The Guardian (June 14, 2021), https://tinyurl.com/mwy2m3bm 19

Sandy E. James and Bamby Salcedo, Nat'l Ctr. for Transgender Equal. and TransLatin@ Coalition, *2015 U.S. Transgender Survey: Report on the Experiences of Latino/a Respondents* (Oct. 2017), https://tinyurl.com/4mp8xusw 18

Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), https://tinyurl.com/bmhahmtz 17

Sandy E. James, et al., Nat'l Ctr. for Transgender Equal., Black TransAdv. and Nat'l Black Justice Coal., *2015 U.S. Transgender Survey:Report on the Experiences of Black Respondents* (Sept. 2017), https://tinyurl.com/ycyv9vnh 18

INTERESTS OF *AMICI CURIAE*[1]

Amici consist of Lambda Legal Defense and Education Fund, Inc., the National Women's Law Center, and the 20 additional organizations listed below. *Amici* are committed to ensuring that all people, including women and LGBTQ people, can live their lives free from discrimination, including with respect to access to health care they need.

Founded in 1973, **Lambda Legal Defense and Education Fund, Inc.** is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or *amicus* in seminal cases regarding the rights of LGBT people and people living with HIV. *See*, *e.g.*, *Bostock v. Clayton Cnty., Ga.*, 140 S.Ct. 1731 (2020); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v.*

[1] No party's counsel authored this brief in whole or in part, and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

Texas, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Since its founding, Lambda Legal has sought to eliminate discriminatory barriers to health care for LGBTQ people, particularly transgender people. This includes, among others: *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F.Supp.3d 1 (D.D.C. 2020); *Fletcher v. Alaska*, 443 F.Supp.3d 1024 (D. Alaska 2020); *Kadel v. Folwell*, 446 F.Supp.3d 1 (M.D.N.C. 2020), *aff'd sub nom. Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422 (4th Cir. 2021), *as amended* (Dec. 2, 2021); and *Fields v. Smith*, 653 F.3d 550 (7th Cir. 2011). Lambda Legal therefore has a particular interest in ensuring that laws, like Arkansas's ban on gender-affirming care for transgender minors, be properly scrutinized by the courts and enjoined.

The **National Women's Law Center** ("**NWLC**") is a nonprofit legal organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since 1972, NWLC has focused on issues of key importance to women and girls, including economic security, reproductive rights and health, workplace justice, and education, with special attention to the needs of low-income women and those who face

multiple and intersecting forms of discrimination, including LGBTQ people. NWLC has participated in numerous cases, including before Courts of Appeals and the U.S. Supreme Court, to ensure that rights and opportunities are not restricted based on sex. Additionally, NWLC has a particular interest in ensuring that discrimination against LGBTQ individuals is not perpetuated in the name of women's rights.

Additional *Amici* include:

- Equality South Dakota
- Family Equality
- Freedom for All Americans
- Gender Justice
- GLBTQ Legal Advocates & Defenders
- Human Rights Campaign
- Intransitive (Mabelvale, Arkansas)
- Legal Voice
- Lucie's Place (Little Rock, Arkansas)
- National Center for Lesbian Rights
- National Center for Transgender Equality
- National LGBTQ Task Force

- One Iowa
- OutNebraska
- PFLAG
- SisterReach
- South Dakota Transformation Project
- Southwest Women's Law Center
- Transformation Project Advocacy Network
- Women's Law Project

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties consent to the filing of this brief.

INTRODUCTION

In April 2021, the Arkansas Legislature passed House Bill 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021), over the governor's veto, and thereby blocked all access for transgender adolescents who suffer from gender dysphoria to the medically necessary and often lifesaving gender-affirming medical care they need. This Health Care Ban prohibits a physician or any other health care professional from providing or referring any individual under the age of 18 for "gender transition procedures." In doing so, Arkansas has placed many transgender adolescents at grave risk of harm and violated their constitutional rights, as well as those of their parents.

Amici fully support the arguments made by Plaintiffs in their brief. The district court did not abuse its discretion when it decided to preliminary enjoin the Health Care Ban and prevent it from taking effect. *Amici* submit this brief to provide the court with additional guidance regarding the multiple reasons why the Health Care Ban is subject to heightened scrutiny under the Fourteenth Amendment. *Amici* also provide additional information as to why the Ban cannot be justified by a purported motivation to protect minors.

Arkansas is the only state that prohibits transgender youth suffering from gender dysphoria from accessing the gender-affirming care that they may need—health care treatments that are well-documented and widely-accepted by the medical and scientific community. This Court should affirm the district court's decision and allow the current injunction to remain in place.

ARGUMENT

I. Arkansas's Health Care Ban is subject to heightened scrutiny because it discriminates based on sex.

It is incontrovertible that "all gender-based classifications … warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quotation omitted). Here, the Ban is subject to heightened scrutiny because: (1) on its face, it is a classification based on sex; (2) "[t]here is [] a congruence between discriminating against transgender … individuals and discrimination on the basis of gender-based [] norms," *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); (3) "discrimination on the basis of … transitioning status is necessarily discrimination based on sex," *Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731 (2020);

and (4) any policy that treats transgender people differently "is inherently based upon a sex-classification," *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017).

a. The Ban facially discriminates based on sex.

The Health Care Ban prohibits a physician or any other health care professional from providing or referring any individual under the age of 18 for "*gender* transition procedures," which it defines as "the process in which a person goes from identifying with and living as a *gender* that corresponds to his or her biological *sex* to identifying with and living as a *gender* different from his or her biological *sex*." Ark. Code Ann. § 20-9-1501(5) (2021). The Ban's explicitly sex-based terms make plain that the discrimination at issue here is based on sex. It simply "cannot be stated without referencing sex," *Whitaker*, 858 F.3d at 1051, and "[o]n that ground alone, heightened scrutiny should apply." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S.Ct. 2878 (2021).

What is more, on its face, the Ban discriminates against transgender minors because their identities differ from the sex they were

designated at birth. The Supreme Court confirmed in *Bostock v. Clayton County, Georgia*, that by discriminating against a transgender person because they identify with a sex that differs from their birth-assigned sex while treating more favorably an otherwise similarly situated person who identifies with the same birth-assigned sex, one "intentionally penalizes" the transgender person "for traits or actions that it tolerates" in the cisgender person. 140 S.Ct. at 1741–42.

The case of *Fletcher v. Alaska*, 443 F.Supp.3d 1024 (D. Alaska 2020), is particularly instructive here. The district court considered an exclusion of coverage for gender-affirming care contained in the Alaska state employee health plan. In granting summary judgment to the plaintiff and declaring the policy unlawful, the court explained that where the plan covers some forms of care "if it reaffirms an individual's natal sex, but denies coverage for the same [care] if it diverges from an individual's natal sex," that constitutes "discrimination because of sex." *Id.* at 1030. That is what the Ban does here. In the words of the court in *Boyden v. Conlin*, 341 F.Supp.3d 979, 995 (W.D. Wisc. 2018), the Ban is a "straightforward" case of sex discrimination.

b. The Ban discriminates based on sex stereotypes.

The Ban also unlawfully discriminates based on sex stereotypes. "There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity." *Harris Funeral Homes*, 884 F.3d at 576–77. Indeed, "[m]any courts … have held that various forms of discrimination against transgender people constitute sex-based discrimination ... because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Grimm*, 972 F.3d at 608. This includes, among others, the First, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits, which have recognized this impermissible sex stereotyping in both constitutional and statutory contexts. *See id.*; *Harris Funeral Homes*, 884 F.3d at 576–77; *Whitaker*, 858 F.3d at 1051; *Glenn*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000). "In so holding, these courts have recognized a central tenet of equal protection in sex discrimination cases: that states 'must not rely on overbroad

generalizations' regarding the sexes." *Grimm*, 972 F.3d at 609 (quoting *Virginia*, 518 U.S. at 533).[2]

Here, the Health Care Ban is based on stereotypes of how a person's body should look vis-à-vis their sex designated at birth. *See* Ark. Code Ann. § 20-9-1501(6)(A) (2021) (prohibiting "any medical or surgical service … related to gender transition that seeks to: (i) Alter or remove physical or anatomical characteristics or features that are *typical for the individual's biological sex*; or (ii) Instill or create physiological or anatomical characteristics that resemble a sex different from the individual's biological sex" (emphasis added)); *cf*. *Kadel v. Folwell*, 446 F.Supp.3d 1, 14 (M.D.N.C. 2020) (finding a health plan's exclusion of gender-affirming care "tethers Plaintiffs to sex stereotypes which, as a

[2] *Amici* refute the assertion made by one of Defendants' *amici* that holding that the Ban unlawfully discriminates based on sex would somehow undermine protections for cisgender women and girls. (WoLF Br. at 25.) Not only is this argument unsupported and without merit but holding that the Ban unlawfully discriminates based on sex would actually strengthen our legal protections against sex discrimination for all women and girls. Affirming that the Ban constitutes unlawful sex discrimination will fortify protections from sex discrimination for all by discouraging the very type of discrimination and generalizations based on archaic notions about sex that has been historically deployed to undermine the equal participation of women and girls in society.

matter of medical necessity, they seek to reject"). But relying on "notions of how sexual organs and gender identity ought to align" is impermissible sex stereotyping. *Harris Funeral Homes*, 884 F.3d at 576; *see also Toomey v. Arizona*, No. CV-19-00035, 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) ("Discrimination based on the incongruence between natal sex and gender identity—which transgender individuals, by definition, experience and display—implicates the gender stereotyping[.]"). Discrimination based on sex "is not only discrimination because of maleness and discrimination because of femaleness," but also "discrimination because of the properties or characteristics by which individuals may be classified as male or female." *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 526 (D. Conn. 2016).

c. The Ban discriminates based on sex because it discriminates based on gender transition.

Moreover, as multiple courts have recognized, discrimination based on gender transition is necessarily discrimination based on sex. *See Harris Funeral Homes*, 884 F.3d at 575 ("discrimination 'because of sex' inherently includes discrimination against employees because of a change in their sex"); *Fabian*, 172 F.Supp.3d at 527; *Schroer v. Billington*, 577 F.Supp.2d 293, 306–07 (D.D.C. 2008).

Just as discrimination based on religious conversion is necessarily based on religion, discrimination based on gender transition is discrimination based on sex. For example, the district court for D.C. noted in *Schroer* that firing an employee for transitioning was impermissible discrimination because of sex just as firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion.'" 577 F.Supp.2d at 306. Even if the employer "harbors no bias toward either Christians or Jews but only 'converts[,]' … [n]o court would take seriously the notion that 'converts' are not covered" by the statutory ban on religious discrimination. *Id.*; *accord Fabian*, 172 F.Supp.3d at 527. "Because Christianity and Judaism are understood as examples of religions rather than the definition of religion itself, discrimination against converts, or against those who practice either religion the 'wrong' way, is obviously discrimination 'because of religion.'" *Id.*

The same analysis applies here: a law that discriminates against those who undertake "gender transition procedures" constitutes discrimination because of sex. As such, the Ban discriminates based on sex.

d. The Ban discriminates based on sex because it discriminates based on transgender status.

Finally, there can be no doubt that classifications based on transgender status are necessarily sex-based classifications. As the Supreme Court recognized in *Bostock*, "it is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex." 140 S.Ct. at 1741. "That is because the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender, making sex a but-for cause for the discriminator's actions." *Grimm*, 972 F.3d at 616.

It is of no consequence that the Ban does not explicitly mention the word "transgender." By definition, the Ban prohibits treatment that *only* transgender people would seek, i.e., gender-affirming care or "gender transition procedures." As the court in *Toomey* explained, "transgender individuals are the only people who would ever seek ['gender transition procedures']." 2019 WL 7172144, at *6. As such, the Ban "singles out transgender individuals for different treatment." *Id.*; *see also Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, No. 4:18-cv-00824, 2021 WL 5052661, at *35 (N.D. Tex. Oct. 31, 2021) (employer's exclusion "would apply only to individuals with gender dysphoria, so on their face,

the policies explicitly target transgender individuals"). Defendants split hairs in arguing otherwise.

Indeed, it is in this very type of circumstance that the Supreme Court has "declined to distinguish between status and conduct." *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 689 (2010). Targeting conduct that is exclusive to a particular identity in fact targets people who share that identity. *See id.* (rejecting the idea that discrimination based on same-sex intimacy was not discrimination based on sexual orientation). The same is true of the Ban.

II. Arkansas's Ban is also independently subject to heightened scrutiny because it discriminates based on transgender status.

The district court correctly determined that heightened scrutiny also independently applies to Arkansas's Ban because it discriminates based on transgender status, reasoning that such discrimination is based on at least a quasi-suspect classification. *Brandt v. Rutledge*, No. 4:21-CV-00450, 2021 WL 3292057, at *2 (E.D. Ark. Aug. 2, 2021). While this Court has not addressed whether laws that discriminate based on transgender status are subject to heightened scrutiny on that basis alone,

the Fourth and Ninth Circuits have held that "heightened scrutiny applies because transgender people constitute at least a quasi-suspect class." *Grimm*, 972 F.3d at 610 (finding "[e]ach factor readily satisfied" with regard to transgender people); *accord Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (affirming the district court's reasoning as to why transgender people are a quasi-suspect class). The same is true for a multitude of district courts. *See, e.g.*, *Ray v. McCloud*, 507 F.Supp.3d 925, 937 (S.D. Ohio 2020); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F.Supp.3d 704, 719–22 (D. Md. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F.Supp.3d 931, 952–53 (W.D. Wis. 2018); *F.V. v. Barron*, 286 F.Supp.3d 1131, 1144 (D. Idaho 2018); *Evancho v. Pine–Richland Sch. Dist.*, 237 F.Supp.3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F.Supp.3d 850, 874 (S.D. Ohio 2016); *Norsworthy v. Beard,* 87 F.Supp.3d 1104, 1119 (N.D. Cal. 2015); *Adkins v. City of New York*, 143 F.Supp.3d 134, 139–40 (S.D.N.Y. 2015).

In identifying whether a classification is suspect or quasi-suspect, courts consider whether: (a) the class has historically been "subjected to discrimination," *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (b) the

class's defining characteristic "bears [any] relation to ability to perform or contribute to society," *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); (c) the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602; and (d) the class is "a minority or politically powerless," *id.*; *see also Grimm*, 972 F.3d at 611; *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013). While not all factors need to be present, *see id.* at 181; *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982), here, all four factors justify treating classifications based on transgender status as suspect or at least a quasi-suspect for equal protection purposes.

First, it is beyond debate that transgender people in our country have experienced a long history of discrimination, including violence and pervasive discrimination in employment, housing, and access to places of public accommodation or government services. *See Grimm*, 972 F.3d at 611; *Whitaker*, 858 F.3d at 1051; *Ray*, 507 F.Supp.3d at 937 ("[T]here is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access

to healthcare." (citation omitted)); *see also Foster v. Andersen*, No. 18-2552, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019).

But "this history of persecution and discrimination is not yet history." *Adkins*, 143 F.Supp.3d at 139. According to a national public opinion study published in 2020 exploring the experiences of LGBTQ Americans, 62 percent of transgender respondents reported experiencing discrimination in the past year. *See* Lindsay Mahowald, Sharita Gruberg, and John Halpin, Ctr. for Am. Progress, *The State of the LGBTQ Community in 2020 A National Public Opinion Study* 4 (Oct. 2020), https://tinyurl.com/yc6vctku. This is consistent with prior studies. For example, according to a 2015 U.S. Transgender Survey, a study involving 27,715 participants, nearly half of transgender respondents reported being "denied equal treatment, verbally harassed, and/or physically attacked in the past year because of being transgender." *See* Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 198 (Dec. 2016), https://tinyurl.com/bmhahmtz.

These numbers become starker when one accounts for particular contexts or backgrounds. For example, over three-quarters (77%) of those who were out or perceived as transgender at some point between K–12 in

school experienced some form of mistreatment, such as being verbally harassed, prohibited from dressing consistent with their gender identity, disciplined more harshly, or physically or sexually assaulted because people thought they were transgender. *Id.* at 132. Over a quarter (27%) of respondents who had held or applied for a job during the past year reported being fired, denied a promotion, or not being hired for a job they applied for because of their gender identity or expression. *Id.* at 12. And these alarming rates of discrimination, harassment, and violence are even higher for transgender people of color, particularly Black and Latino/a transgender people. *See*, *e.g.*, Sandy E. James and Bamby Salcedo, Nat'l Ctr. for Transgender Equal. and TransLatin@ Coalition, *2015 U.S. Transgender Survey: Report on the Experiences of Latino/a Respondents* (Oct. 2017), https://tinyurl.com/4mp8xusw; Sandy E. James, et al., Nat'l Ctr. for Transgender Equal., Black Trans Adv. and Nat'l Black Justice Coal., *2015 U.S. Transgender Survey: Report on the Experiences of Black Respondents* (Sept. 2017), https://tinyurl.com/ycyv9vnh.

Courts that have recognized these alarming rates of discrimination have also cited "current measures and policies [that] continue to target

transgender persons to differential treatment." *Grimm*, 972 F.3d at 612 (noting, among others, the re-implementation in 2017 of "policies precluding transgender persons from military service" and the rescission by federal agencies of protections from discrimination based on gender identity). Indeed, more than 110 bills targeting transgender people for discrimination were introduced across dozens of state legislatures in 2021, with some of them becoming law. *See*, *e.g.*, *2021 set a record for anti-transgender bills. Here's how you can support the community*, PBS NewsHour (Dec. 30, 2021 6:44PM EST), https://tinyurl.com/2p8c4h94; Sam Levin, *Mapping the anti-trans laws sweeping America: 'A war on 100 fronts'*, The Guardian (June 14, 2021), https://tinyurl.com/mwy2m3bm; Priya Krishnakumar, *This record-breaking year for anti-transgender legislation would affect minors the most*, CNN.com (Apr. 15, 2021), https://tinyurl.com/3xun7z7x. The effects of these policies targeting transgender persons for differential treatment are profound. Indeed, "2021 was the deadliest year for transgender and gender non-conforming people in the U.S. on record." Madeleine Carlisle, *Anti-Trans Violence and Rhetoric Reached Record Highs Across America in 2021*, TIME (Dec. 30, 2021), https://tinyurl.com/3dcpas6r.

Second, being transgender bears no relationship with a person's ability to perform or contribute to society. *See Grimm*, 972 F.3d at 612; *see also Evancho*, 237 F.Supp.3d at 288; *Highland Local Sch. Dist.*, 208 F.Supp.3d at 874; *Adkins*, 143 F.Supp.3d at 139. "[A]s should by now be uncontroversial," "being transgender is natural." *Kadel*, 12 F.4th at 427. Over a decade ago, the American Psychiatric Association concluded that being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (July 2012); *see also Kadel*, 12 F.4th at 427.

Third, transgender people have an obvious, immutable, or distinguishing characteristic that defines them as a discrete group.

> Transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and … being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. But unlike being cisgender, being transgender marks the group for different treatment.

Grimm, 972 F.3d at 612–13 (citation omitted); *see also Ray*, 507 F.Supp.3d at 937 ("[T]ransgender people have common, immutable characteristics that define them as a discrete group, primarily in that

their gender identity does not align with the gender they were assigned at birth.").

While "[t]his consideration is often couched in terms of 'immutability,' … the test is broader." *Windsor*, 699 F.3d at 183. "No 'obvious badge' is necessary." *Id.* (citing *Mathews v. Lucas,* 427 U.S. 495, 506 (1976)). Nor is a "biological basis" for the characteristic necessary. *See Windsor*, 699 F.3d at 183 (noting "[c]lassifications based on alienage, illegitimacy, and national origin are all subject to heightened scrutiny"); *Whitewood v. Wolf*, 992 F.Supp.2d 410, 429 (M.D. Pa. 2014) ("[A]lthough this factor is often phrased in terms of 'immutability,' the test is broader, encompassing groups whose members can hide the distinguishing trait and where the characteristic is subject to change.").[3] What matters is that the characteristic be "so fundamental to one's identity that a person should not be required to abandon it," *Golinski v. U.S. Off. of Pers. Mgmt.*,

[3] To be sure, while not necessary for purposes of this analysis, there is a biological basis to gender identity and transgender status. *See* Pls.' Br. at 4, n.2; *D.T. v. Christ*, No. CV-20-00484, 2021 WL 3419055, at *3 (D. Ariz. Aug. 5, 2021) ("This gender identity in transgender people has a biological component and cannot be changed."); *Hecox v. Little*, 479F.Supp.3d 930, 945 (D. Idaho 2020) (noting "there is a medical consensus that there is a significant biologic component underlying gender identity").

824 F.Supp.2d 968, 987 (N.D. Cal. 2012), or that the characteristic "calls down discrimination when it is manifest," *Windsor*, 699 F.3d at 183. *See also Love v. Beshear*, 989 F.Supp.2d 536, 546 (W.D. Ky. 2014) ("As to immutability, the relevant inquiry is not whether a person could, in fact, change a characteristic, but rather whether the characteristic is so integral to a person's identity that it would be inappropriate to require her to change it to avoid discrimination.").

Here, transgender status is such a characteristic. The transgender status of transgender persons is "inherent in who they are as people." *Evancho*, 237 F.Supp.3d at 288. It is neither a "choice" nor "changeable." *Id.* at 277, n.12. And, as illustrated herein, transgender status is a characteristic that "calls down discrimination when it is manifest." *Windsor*, 699 F.3d at 183; *see Arroyo González v. Rosselló Nevares*, 305 F.Supp.3d 327, 333 (D.P.R. 2018) (noting that disclosure of transgender status "exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger"); *Adkins*, 143 F.Supp.3d at 139–40.

Fourth, "[t]ransgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political

process." *Grimm*, 972 F.3d at 613. In fact, "transgender people are unarguably a politically vulnerable minority." *F.V.*, 286 F.Supp.3d at 1144; *see also Evancho*, 237 F.Supp.3d at 288. "Even considering the low percentage of the population that is transgender, transgender persons are underrepresented in every branch of government." *Grimm*, 972 F.3d at 613. And as illustrated above, "[t]ransgender people constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process." *Id.*

In sum, "transgender people as a class have historically been subject to discrimination or differentiation; … they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; … as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and … as a class, they are a minority with relatively little political power." *Evancho*, 237 F.Supp.3d at 288.

This Court should therefore join the Fourth and Ninth Circuits and myriad district courts across the country in holding that laws, such as the Health Care Ban, that discriminate based on a person's transgender

status are suspect or quasi-suspect and therefore subject to heightened scrutiny. *See Ray*, 507 F.Supp.3d at 937 (collecting cases).

III. Arkansas's Ban is subject to strict scrutiny because it interferes with constitutionally protected fundamental rights of parents to seek medical care for their children.

"[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Though this right is not absolute, *see infra*, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *see also King v. Olmsted Cnty.*, 117 F.3d 1065, 1067 (8th Cir. 1997) ("We have recognized a right to familial relations, which includes the liberty interest of parents in the custody, care, and management of their children.").

This parental liberty interest generally encompasses the "fundamental right to direct the medical care of their children." *Kanuszewski v. Michigan Dep't of Health & Human Servs.*, 927 F.3d 396, 419 (6th Cir. 2019); *see also Parham v. J.R.*, 442 U.S. 584, 602 (1979)

(parent's right to raise their child includes the ability "to recognize symptoms of illness and to seek and follow medical advice"); *Treistman ex rel. AT v. Greene*, 754 F.App'x 44, 47 (2d Cir. 2018) ("[P]arents have a right to determine the medical care their children receive and the government's interference in that right can violate due process." (citing *van Emrik v. Chemung Cnty. Dep't of Soc. Servs.*, 911 F.2d 863, 867 (2d Cir. 1990))); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) ("[A] parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care."). And contrary to the State's argument, the parent's fundamental right exists independently of the child's right. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (recognizing distinct rights of parent and child); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (distinguishing between the parent's right to "bring up children" and "control [their] education" and the child's "opportunities … to acquire knowledge").

These parental rights are not absolute, particularly when they conflict with a child's independent liberty interests. *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74–75 (1976)

(parent's interest in termination of minor child's pregnancy "is no more weighty than the right of privacy of the competent minor"), *overruled on other grounds by Planned Parenthood of Southern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Manzano v. South Dakota Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995) (parents' liberty interest vis-à-vis their children "has never been deemed absolute or unqualified" (quotation omitted)). But when the parent's and child's liberty interests in pursuing a course of medical care align, the strength of those interests is at its apex against state interference. *Cf. Santosky*, 455 U.S. at 760 (heightened evidentiary standards required where the "vital interest" of the parent and child in preserving their relationship "coincide.").

The district court appropriately credited the strength of the Parent Plaintiffs' "fundamental right to seek medical care for their children," examining it "in conjunction with their adolescent child's consent and their doctor's recommendation, mak[ing] a judgment that medical care is necessary." *Brandt*, 2021 WL 3292057, at *5. Because the Ban bars these parents from pursuing the medically necessary care their transgender adolescents with gender dysphoria need, the district court correctly held that the Ban violated the parents' substantive due process rights. The

Ban interferes directly and substantially with the rights of parents of transgender youth to direct their children's medical care and is therefore subject to strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *Zablocki v. Redhail*, 434 U.S. 374, 387–88 (1978).

IV. The Ban triggers strict scrutiny for the additional reason that it infringes the protected liberty interests of transgender minors in their own bodily autonomy.

Though not a claim raised by Plaintiffs-Appellees, the Ban triggers strict scrutiny for the additional reason that it infringes upon the liberty interests of transgender minors in their own bodily autonomy.

"It is settled now … that the Constitution places limits on a State's right to interfere with a person's most basic decisions about … bodily integrity." *Casey*, 505 U.S. at 849 (citing *Washington v. Harper*, 494 U.S. 210, 221–22 (1990); *Winston v. Lee*, 470 U.S. 753 (1985); and *Rochin v. California*, 342 U.S. 165 (1952)). Inherent in the fundamental right to privacy is the right to "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person," *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), and the right to make "personal choices central to individual dignity and autonomy," *Obergefell*, 576 U.S. at 663; *see also Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965); *McNally v. Pulitzer*

Pub. Co., 532 F.2d 69, 76 (8th Cir. 1976) ("[T]he most intimate phases of personal life have been held to be constitutionally protected."). These constitutionally protected liberty interests implicate "choices central to individual dignity and autonomy"—i.e., decisions that "shape an individual's destiny." *Obergefell*, 576 U.S. at 663, 666; *see also Lawrence v. Texas*, 539 U.S. 558, 578 (2003). They protect the right of every person to possess and control their own person and to define their own personal identity. *See Obergefell*, 576 U.S. at 633.

These liberty and privacy rights encompass the right of bodily autonomy—a person's control over their body and what happens to it. *See Rogers v. City of Little Rock, Ark.*, 152 F.3d 790, 795 (8th Cir. 1998) ("substantive due process right to bodily integrity" includes protection "against nonconsensual intrusion into one's body" and the right of a competent person to refuse medical care). As this Court held in *Bishop v. Colaw*, the right to control even one's personal appearance is part of "'the right of every individual to the possession and control of his own person, free from all restraint or interference of others.'" 450 F.2d 1069, 1075 (8th Cir. 1971) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

Minors, like the transgender adolescents at issue here, possess these liberty and privacy rights just as adults do. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Danforth*, 428 U.S. at 74. Though "the State has somewhat broader authority to regulate the activities of children than of adults," *id.* at 74–75, "[a] child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality opinion). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *Application of Gault*, 387 U.S. 1, 13 (1967). When the government deprives minors of their liberty or property interests, "the child's right is virtually coextensive with that of an adult." *Bellotti*, 443 U.S. at 634.

Among a minor's liberty interests is the fundamental right to privacy and autonomy with respect to their own medical care, especially care that implicates intimate matters. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 692 (1977) (statute barring distribution of contraceptives to people under age 16 violated minors' privacy rights);

Bellotti, 443 U.S. at 647 (recognizing mature minors' fundamental right to reproductive autonomy); *Danforth*, 428 U.S. at 74–75. Because of these protected interests, the state may not "constitutionally infringe on a minor's ability to protect her health." *Planned Parenthood of Rocky Mountains Servs., Corp. v. Owens*, 287 F.3d 910, 918 (10th Cir. 2002).

The Health Care Ban infringes on transgender adolescents' rights to make decisions about their bodies and their health needs and bars them from accessing the often lifesaving care necessary to treat their gender dysphoria. *See Reno v. Flores*, 507 U.S. 292, 302 (1993) (substantive due process forbids government from infringing fundamental liberty interests, "no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").[4]

[4] Some Courts have applied intermediate scrutiny to infringements of minors' fundamental rights in order to both rigorously protect those rights and accommodate legislative efforts to account for minor's vulnerabilities. *See Ramos v. Vernon*, 353 F.3d 171, 180–81 (2d Cir. 2003). Others apply strict scrutiny, while recognizing those vulnerabilities in assessing whether the governmental interest is sufficiently compelling. *See Nunez ex rel. Nunez v. San Diego*, 114 F.3d 935, 946 (9th Cir. 1997).

V. The Health Care Ban cannot be justified based on Arkansas's purported interest in protecting minors.

Arkansas's Health Care Ban does not protect anyone; rather, it harms transgender minors with gender dysphoria by denying them the gender-affirming health care they need. Defendants argue that the Ban is justified in order to protect minors "from harmful experimentation" and the prohibited treatments that allegedly offer "no discernible mental-health benefits." (Defs. Br. at 43–44.) As Plaintiffs aptly argue and for the reasons articulated in the briefs by other *amici* in support of affirmance, Defendants are wrong on both accounts. *Amici* do not seek to replicate the arguments presented by Plaintiffs and these other *amici*; rather, *Amici* simply provide some additional information explaining why the justification provided by Defendants fails.

As the Fourth Circuit has recognized, gender-affirming "treatments are not cosmetic, elective, or experimental." *Kadel*, 12 F.4th at 427. "Rather, they are safe, effective, and often medically necessary." *Id.* at 427–28. That is also the official, consensus, evidence-based position of the National Academies of Science, Engineering, and Medicine. In a 2020 Consensus Study Report, the National Academies noted that "[c]linicians who provide gender-affirming psychosocial and medical services in the

United States are informed by expert evidence-based guidelines" and that the *Standards of Care for the Health of Transgender, Transsexual, and Gender-Nonconforming People*, published by the World Professional Association for Transgender Health (WPATH), and Endocrine Society's guidelines are "informed by the best available data" and have established an "expert consensus that gender-affirming care is medically necessary and, further, that withholding this care is not a neutral option." Nat'l Acad. of Sciences, Eng'g, and Med., *Understanding the Well-Being of LGBTQI+ Populations* (2020), at 12-10, https://doi.org/10.17226/25877. Indeed, "withholding care," as the Health Care Ban seeks to do, "increases distress and decreases well-being." *Id.*

This is amply demonstrated by the record below, as noted by Plaintiffs, and by the available scientific research. For example, one of the most recent studies on this topic highlights how transgender people who accessed gender-affirming hormone treatment during adolescence have lower odds of suicidal ideation and severe psychological distress in adulthood, as compared to those who desired but were not able to access gender-affirming hormone treatments. *See* Jack L. Turban, et al. (2022), *Access to gender-affirming hormones during adolescence and mental*

health outcomes among transgender adults, PLoS ONE 17(1):e0261039, (Jan. 12, 2022), https://doi.org/10.1371/journal.pone.0261039. Indeed, this study and others discussed in the record below directly undermine Arkansas's stated justification of protecting minors. As detailed herein, the Ban serves only to *harm transgender youth*.

CONCLUSION

For the foregoing reasons, and those articulated in Plaintiffs' brief, *Amici* respectfully request that this Court affirm the district court's decision to preliminarily enjoin Arkansas's ban on the provision and referral of gender-affirming medical care for transgender minors.

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

Gretchen Borchelt
Sunu Chandy
Dorianne Mason
Alison Tanner
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle N.W., Suite 800
Washington, DC 20036
(202) 588-5180

Nicholas "Guilly" Guillory
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
3500 Oak Lawn Avenue, Ste. 500
Dallas, TX 75219
(214) 219-8585

Omar Gonzalez-Pagan
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585

Karen Loewy
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
1776 K Street, N.W., 8th Floor
Washington, DC 20006
(202) 804-6245

January 19, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned hereby certifies that:

1. This brief complies with the type-volume limitation, as set forth in Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), because it contains 6,207 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements, as provided in Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements, as provided in Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

3. As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated this 19th of January, 2022.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2022, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the Appellate CM/ECF system, and that it has been served on all counsel of record through the court's electronic filing system.

Dated this 19th of January, 2022.

/s/ Omar Gonzalez-Pagan
Omar Gonzalez-Pagan
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
120 Wall Street, 19th Floor
New York, NY 10005