

Case 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
The Honorable James M. Moody, Jr., District Judge

Plaintiffs-Appellees' Response to Defendants-Appellants'

Petition for Rehearing En Banc

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TABLE OF CONTENTS

TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
INTRODUCTION.....	1
BACKGROUND.....	2
A. The District Court Grants a Preliminary Injunction.....	4
B. The Court Issues a Narrow Decision Affirming the Preliminary Injunction Based on the Equal Protection Claim.	5
ARGUMENT	8
I. The Court Correctly Applied Settled Equal Protection Law.	8
A. The Court Correctly Concluded That the Healthcare Ban Triggers Heightened Scrutiny.	9
B. The Court Properly Reviewed the District Court’s Factual Findings for Clear Error.	12
II. En Banc Review of the Preliminary Injunction Would Waste Judicial Resources.	14
CONCLUSION	16
CERTIFICATE OF COMPLIANCE	18
CERTIFICATE OF SERVICE.....	19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Dobbs v. Jackson Women’s Health Org.</i> , 142 S. Ct. 2228 (2022)	11
<i>Geduldig v. Aiello</i> , 417 U.S. 484 (1974)	11
<i>Heckler v. Mathews</i> , 465 U.S. 728 (1984)	9
<i>Hopkins v. Jegley et al.</i> , No. 17-2879 (8th Cir. 2020)	8
<i>PCTV Gold, Inc. v. SpeedNet, LLC</i> , 508 F.3d 1137 (8th Cir. 2007)	14
<i>Sessions v. Morales-Santana</i> , 137 S. Ct. 1678 (2017)	9
<i>Tuan Anh Nguyen v. I.N.S.</i> , 533 U.S. 53 (2001)	10, 11
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	10, 11
Statutes	
Ark. Code Ann. § 20-9-1501	2, 3
Other Authorities	
Fed. R. App. P. 35(a)	1, 8

INTRODUCTION

Petitioners ask the full Court to review en banc a narrow opinion that resolved a single claim in a preliminary posture, with trial on the merits already underway. Petitioners cannot show that the opinion conflicts with this Court’s decisions, nor do they claim that the appeal raises issues of “exceptional importance.” Fed. R. App. P. 35(a). Instead, the Petition rests on the assertion that “[t]he panel’s analysis conflicts with the Supreme Court’s equal-protection precedents” and a quarrel with the Court’s deference to the district court’s factual findings.

The Petition relies on a strained interpretation of the opinion and reflects a deep misunderstanding of the purpose of en banc review. The Court correctly concluded based on application of Supreme Court and Eighth Circuit precedent that the district court did not abuse its discretion in holding that Plaintiffs are likely to succeed on the merits of their claim that Arkansas’s prohibition on gender-affirming medical care for transgender minors violates the Equal Protection Clause. The Petition attempts to relitigate the merits of the appeal—an aim squarely at odds with the purpose of the en banc process. If Petitioners were entitled to en banc review under these circumstances, any panel decision would warrant en banc review. That is not the law in this or any court of appeals.

En banc review would also be a waste of judicial resources. Trial in this case is ongoing. The factual premises underlying the Petition will soon be resolved.

There is no reason for the full Court to review an interlocutory decision on a limited record when a final resolution is right around the corner, especially when the trial will address additional constitutional claims that the Court did not consider. And Petitioners' claim that review cannot wait for the trial to be completed and the judge to issue a decision on the merits is hard to square with their decision to forego any stay of the injunction, which has been in place for 15 months, and to seek multiple extensions before filing the Petition.

In short, the Petition makes no attempt to satisfy this Court's well-established requirements for en banc review and grossly understates the inefficiencies of reviewing a preliminary injunction *after* the commencement of the merits trial. The Petition should be denied.

BACKGROUND

On April 6, 2021, the Arkansas General Assembly overrode Governor Hutchinson's veto and passed Act 626 (the "Healthcare Ban" or the "Ban") into law. The Healthcare Ban prohibits any "physician or other healthcare professional" from providing "gender transition procedures to any individual under eighteen (18) years of age." HB 1570 § 3, Ark. Code Ann. § 20-9-1501(a)-(b). The Healthcare Ban defines "gender transition" 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, and may involve social, legal,

or physical changes.” *Id.* § 20-9-1501(5). “Gender transition procedures” are “any medical or surgical service” or “prescribed drugs related to gender transition that seeks to: (i) [a]lter or remove physical or anatomical characteristics or features that are typical for the individual’s biological sex; or (ii) [i]nstill or create psychological or anatomical characteristics that resemble a sex different from the individual’s biological sex,” including puberty-blocking medication, cross-sex hormones, or “other mechanisms to promote the development of feminizing or masculinizing features in the opposite biological sex.” *Id.* § 20-9-1501(6)(A). The Ban also prohibits physicians and other healthcare professionals from “refer[ring] any individual under eighteen (18) years of age to any healthcare professional for gender transition procedures.” *Id.* § 20-9-1502(b) (the “Referral Prohibition”).

Plaintiffs are four minors, their parents, and one physician who provides the care prohibited under the statute.¹ Shortly after the Ban became law, they filed this suit, alleging the Ban violated the Equal Protection Clause by discriminating on the basis of sex and transgender status. The parents also challenged the Ban under the Due Process Clause, alleging that it infringed their fundamental right to seek appropriate medical care for their children. All Plaintiffs also brought claims under the First Amendment to challenge the Referral Prohibition.

¹ Another physician, Dr. Michele Hutchison, has since left her position at the Gender Spectrum Clinic, and accordingly, voluntarily dismissed her claims.

A. The District Court Grants a Preliminary Injunction.

Plaintiffs moved for a preliminary injunction, which the district court granted on the record on July 21, 2021 (App. 1123 (the “P.I.Tr.”)), followed by a supplemental written order that issued on August 2, 2021 (R. Doc. 64 (the “Order”)). In doing so, it relied on extensive briefing from the parties and *amici*, as well as expert declarations submitted by both sides. At the outset, the district court explained that each Plaintiff had standing to challenge the Healthcare Ban. P.I.Tr. 61:16-63:2; Order 2. It also held the physician Plaintiff, Dr. Stambough, had third-party standing to challenge the Healthcare Ban on behalf of her patients. P.I.Tr. 63:3-12; Order 3. On the equal protection claim, the district court held that the Healthcare Ban is subject to heightened scrutiny because it classifies on the basis of sex and transgender status, which the court held was a “quasi-suspect class.” P.I.Tr. 66:11-15; Order 4 (quoting *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020)). Applying heightened scrutiny, the district court ruled that “[a]t this point in the proceedings . . . Act 626 is not substantially related to protecting children in Arkansas from experimental treatment or regulating the ethics of Arkansas doctors.” Order 7. The district court also held that the Healthcare Ban would violate the Equal Protection Clause even under rational basis review. P.I.Tr. 67:16-19; Order 8.

The district court then considered Plaintiffs’ other constitutional claims. It held that Plaintiffs were likely to succeed on their due process claim because the

State could not demonstrate a “compelling interest in infringing upon parents’ fundamental right to seek medical care for their children, or that Act 626 is narrowly tailored to serve that interest.” Order 10. The district court further held that the Referral Prohibition “is a content and viewpoint-based regulation” of speech and could not survive strict scrutiny under the First Amendment. Order 11.

After holding that Plaintiffs were likely to succeed on their claims, the district court considered the other preliminary injunction factors. The district court concluded that not enjoining the Ban would “cause irreparable physical and psychological harms to the Patient Plaintiffs by terminating their access to necessary medical treatment.” Order 8. The district court then considered the “State’s interest in enforcing Act 626 during the pendency of the litigation,” and concluded that it “pale[d] in comparison to the certain and severe harm faced by Plaintiffs.” Order 9.

B. The Court Issues a Narrow Decision Affirming the Preliminary Injunction Based on the Equal Protection Claim.

Without seeking a stay of the district court’s order, Petitioners appealed the preliminary injunction on August 23, 2021. After hearing oral argument on June 15, 2022, the panel unanimously affirmed on August 25, 2022 (“Op.”).

The Court first rejected Petitioners’ argument that Plaintiffs lacked standing, ruling that there was “at least one plaintiff with standing to bring each of Plaintiffs’ claims.” Op. 6 n.3. The Court therefore did not address the district court’s

conclusion that Dr. Stambough also had third-party standing to sue on behalf of her patients. Op. 5–6 & n.3.

Applying well-established precedent, the Court explained that “the decision to grant a preliminary injunction” is reviewed “for abuse of discretion” and that factual findings are reviewed for clear error. Op. 6 (citing *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019); *Dixon v. Crete Med. Clinic, P.C.*, 498 F.3d 837, 847 (8th Cir. 2007)).

On the merits, the Court upheld the preliminary injunction based on Plaintiffs’ equal protection claim. It reasoned that the district court correctly applied heightened scrutiny because “[t]he biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not.” Op. 7 (citing *Heckler v. Mathews*, 465 U.S. 728, 744 (1984)). The Court then considered whether the Healthcare Ban was substantially related to the State’s asserted interests in “protecting children from experimental medical treatment and regulating ethics in the medical profession,” and held that it was not. Op. 8. The Court explained that “substantial evidence” in the record supports the district court’s factual findings that the Ban “prohibits medical treatment that conforms with ‘the recognized standard of care for adolescent gender dysphoria,’ [and] that such treatment ‘is supported by medical evidence that has been subject to rigorous study.’” Op. 9. The Court rejected Petitioners’ argument that the district court failed to consider

its evidence, and held, applying the deferential clear error standard, that it was “not left with the ‘definite and firm conviction’ that the district court’s factual findings are clearly erroneous.” Op. 10 (citation omitted).

Given its conclusion on the equal protection claim, the Court declined to reach the district court’s alternative bases for issuing the preliminary injunction. The Court did not consider whether the Ban “facially discriminates against transgender people, who constitute a quasi-suspect class,” or whether the law could survive rational basis review. Op. 8 n.4, 11. Nor did it address Plaintiffs’ due process or First Amendment claims. Op. 11.

While the preliminary injunction appeal was pending, the parties engaged in merits discovery for nearly a year. The parties exchanged sixteen expert reports, took more than a dozen depositions, produced thousands of pages of records, and briefed motions in limine and motions to exclude in advance of trial. Trial began on October 17, 2022 and is currently underway.

ARGUMENT

“An en banc . . . rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance.” Fed. R. App. P. 35(a). Petitioners do not engage with that standard, nor do they make any attempt to satisfy either prong. Instead, Petitioners improperly seek to relitigate the factual and legal underpinnings of the district court’s order based on purported inconsistencies between the panel opinion and Supreme Court precedent.

The Petition should be denied. *First*, as Petitioners have recently acknowledged, “[a] panel’s supposed misapplication of . . . Supreme Court precedent is no ‘question of exceptional importance.’” Appellants’ Resp. to Pet. for Reh’g En Banc at 9, *Hopkins v. Jegley et al.*, No. 17-2879 (8th Cir. Oct. 14, 2020). *Second*, review at this juncture would waste judicial resources. Petitioners concede that the district court’s preliminary injunction may become moot long before the full Court would hear argument and issue a decision. The ongoing trial will provide a full record of the contested factual issues and resolve constitutional claims not addressed in the opinion or raised in the Petition.

I. The Court Correctly Applied Settled Equal Protection Law.

Petitioners claim that en banc rehearing is necessary to reverse the Court’s holding that the Ban triggers heightened review, which they assert “eschews traditional

equal-protection principles, ignores the statute’s text, and . . . conflicts with the Supreme Court’s most recent equal-protection holding.” Pet. 1. Even if supportable (they are not), these arguments would not justify en banc review. And the Court did not err on any of these points. Its application of heightened scrutiny was dictated by a long line of Supreme Court decisions holding that intermediate scrutiny applies to sex-based classifications. And the Court’s holding that the district court’s fact-finding was not clearly erroneous adhered to the deferential standards long articulated by this Court. Additionally, Petitioners have come nowhere close to showing that the opinion conflicts with any Supreme Court decision. As Petitioners have recognized, en banc review is not appropriate simply because a party is dissatisfied with an outcome.

A. The Court Correctly Concluded That the Healthcare Ban Triggers Heightened Scrutiny.

The application of heightened scrutiny to the Ban followed from a straightforward reading of settled law and the statute’s plain text. To determine if heightened scrutiny applies, the Court relied on *Heckler v. Mathews*, which articulated the “firmly-established principle[]” that “the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification.” 465 U.S. 728, 744 (1984) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). That principle has been affirmed many times since by the Supreme Court. *See Sessions v. Morales-*

Santana, 137 S. Ct. 1678, 1690 (2017); *United States v. Virginia*, 518 U.S. 515, 531 (1996).

Turning to the statute, the Court agreed with the district court that the Ban classifies based on sex and thus, triggers heightened scrutiny, reasoning that the law prohibits “gender transition procedures,” and defines those procedures by reference to “biological sex.” Op. 7. Indeed, the Court explained, “under the Act, medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex.” Op. 7. For example, “[a] minor born as a male may be prescribed testosterone or have breast tissue surgically removed . . . but a minor born as a female is not permitted to seek the same medical treatment” as a result of the Ban. Op. 7. This can be nothing other than sex discrimination subject to heightened scrutiny.

Petitioners argue that en banc review is appropriate because the opinion “eschewed” Supreme Court precedent regarding when heightened scrutiny is warranted. *First*, Petitioners imply that the decision “ignor[ed] biological sex differences.” Pet. 9. In support of their argument that somehow heightened scrutiny is not warranted where “biological sex differences” are involved, Petitioners rely on a single Supreme Court decision, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001), where the Supreme Court did, in fact, apply *heightened scrutiny*. *Tuan Anh Nguyen* involved an immigration statute that treated the citizenship of children born out of wedlock differently based on the gender of the American parent. *Id.* at 70. Applying heightened

review to the factual record, the Supreme Court held that the government had shown an “exceedingly persuasive justification” for the law; because “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood,” a father need not be present at the birth of a child, thus less stringent rules for citizen mothers were justified. *Id.* at 63. Petitioners’ claim that this somehow means some sex discrimination is not subject to heightened review is meritless. Just like the decision here, *Tuan Anh Nguyen* applied the Supreme Court’s settled rule that heightened review applies to sex-based classifications. *Virginia*, 518 U.S. at 533.

Second, Petitioners argue that the Court’s decision conflicts with *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), which held that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245-46 (2022). Unlike the statute at issue in *Geduldig*, which involved a state disability plan that excluded pregnancy benefits (in other words, a statute that did not facially mention sex), the prohibition at issue here turns explicitly on a patient’s sex. As the Court explained, the Ban regulates medical care based on whether it is used for purposes of “gender transition,” and expressly conditions the availability of that care with reference to an individual’s “biological sex.” That is textbook sex discrimination.

Petitioners also claim that the Court misunderstood the meaning of “medical procedure.” According to Petitioners, “[o]ne cannot separate the goal of a treatment from the mechanism a physician uses to achieve it.” Pet. 11. But the Court rightly acknowledged that the purpose of medical care goes to the State’s *justifications* for its sex-based classification, not whether there is a sex-based classification in the first place. Op. 7.

B. The Court Properly Reviewed the District Court’s Factual Findings for Clear Error.

The Court correctly reviewed the district court’s factual findings for clear error. In an attempt to meet their burden to “show that the statute is substantially related to a sufficiently important government interest,” Op. 8 (citing *Virginia*, 518 U.S. at 531), Petitioners asserted two interests: “protecting children from experimental medical treatment” and “regulating ethics in the medical profession.” Op. 8. After making factual findings, the district court ruled that Petitioners failed to meet their burden.

Applying the appropriate “clear error” standard, the Court held that “the record at this stage provides substantial evidence to support” the district court’s “factual findings.” Op. 8. The Court noted that the district court had considered “scientific literature[,] declarations from medical experts[, and] expert opinions” submitted by both sides, and had carefully “weigh[ed] the competing evidence.” Op. 8. The Court also considered Petitioners’ specific arguments that gender-affirming medical care lacks adequate research and is “experimental,” explaining that evidence in the record

showed that “hormone treatments have been evaluated in the same manner as many other medical treatments,” and that the Healthcare Ban “prohibits medical treatment that conforms with the recognized standard of care.” Op. 9. On this record, the Court found no error in the district court’s conclusion that Petitioners’ burden was not met. That holding does not create tension with any decision of this Court or the Supreme Court.

Petitioners make no serious attempt to argue otherwise. They claim first that the Court “failed to even consider the General Assembly’s understanding of the evidence,” and merely affirmed the district court’s decision based on an amicus brief from medical groups explaining that the prohibited treatment was supported by every major medical association in the United States. Pet. 14. That misstates both the district court record and the opinion. The preliminary injunction was supported by a factual record that included both Petitioners’ proffered evidence and Plaintiffs’ evidence showing that the banned medical care is safe and effective. Op. 8. The litigation of this factual dispute is not appropriate for en banc review.

Petitioners next argue that “the panel doubled down on [its error] by imputing to the district court factual findings that it never made.” Pet. 14. But that too mischaracterizes the proceedings in this case. Petitioners’ claim that the district court somehow did not actually find facts necessary to support its holding is unsupported. The district court is not required to show its work on every factual dispute, and on

review “an appellate court must remain mindful as to the district courts being closer to the facts and the parties, and not everything which may be important in a lawsuit necessarily comes through in exactly that way on the printed page.” *PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1142 (8th Cir. 2007). The Order considered the State’s argument that “there is a lack of credible scientific evidence that gender-transition procedures improve children’s health” and its assertion that recent international decisions justify the Ban. Order 5. Those were the exact issues discussed at length in the Court’s opinion. Op. 9. The Court and the district court therefore considered (and rejected) the exact same evidence put forward by the State.

Even if Petitioners were correct that the panel erred in some respect by being overly deferential to the district court’s fact-finding, that is not a basis for en banc consideration.

II. En Banc Review of the Preliminary Injunction Would Waste Judicial Resources.

Petitioners offer no sound basis for the full Court to wade into this case now. If the Court were to review this case in a preliminary posture, it would not have the benefit of the full record currently being developed at trial. Since the district court entered the preliminary injunction, the parties have developed an extensive factual record regarding the State’s asserted interests in the Healthcare Ban. The trial began on October 17, 2022. The factual premises that Petitioners claim support en banc review will soon be presented at trial, subjected to cross-examination, and resolved by

the district court. *See* Pet. 11 (citing declaration of Dr. Paul Hruz, an expert who will testify at trial).

The full Court's review of the issues raised by Petitioners would also not fully resolve Plaintiffs' claims. If the Court were to review this case in a preliminary posture, it would not have the benefit of the full record developed at trial. Nor would it have an opportunity to review Plaintiffs' due process and First Amendment claims, both of which were successful at the preliminary injunction stage. Order 9-11. The Court would therefore benefit from deferring any review until after the district court resolves all of Plaintiffs' claims on a full evidentiary record.

Petitioners argue that review is necessary now to prevent "piecemeal litigation." It is not. The Plaintiffs are presenting evidence that the law not only violates the Equal Protection Clause because it fails heightened scrutiny, but also that it does not survive rational basis review. Even if Petitioners were right that the district court incorrectly applied heightened review, a new trial would not be required to resolve this case.

Petitioners are aware that a final judgment on the merits is imminent, but nonetheless ask this Court to take the case now because it is *possible* that it could reach a decision before the appeal of the preliminary injunction becomes moot. While the district court is in the process of hearing a trial on the merits, Petitioners ask the full Court to rush in and lift the preliminary injunction that has protected Plaintiffs for the

past fifteen months from what the district court found would be “irreparable physical and psychological harms” of losing access to or being forced to discontinue “necessary medical treatment,” Order 8, findings the Court held were not clearly erroneous. Op. 10. Petitioners offer no justification for that extraordinary request in a case where the injunction is causing no harm to Petitioners, the factual findings underlying the injunction have not changed or been shown to be clearly erroneous, and the injunction is soon to be replaced by a final decision on a more fully developed factual record.

CONCLUSION

For the reasons stated above, the Court should deny Defendants-Appellants’ petition for rehearing en banc.

Dated: October 17, 2022

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the type-volume limits of Fed. R. App. P. 35(e), because it contains 3,682 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this motion complies with the requirements of Fed. R. App. P. 32(a)(5)-(6), because it has been prepared in proportionally spaced typeface with 14-point Times New Roman and uses the word-processing system Microsoft Word.

Additionally, pursuant to Eighth Circuit Local Rule 28A(h)(2), the undersigned counsel certifies that this PDF file was scanned for viruses, and no viruses were found in the file.

/s/ Laura Kabler Oswell

Laura Kabler Oswell

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. I further certify that upon approval by the Clerk, I will serve paper copies of the foregoing document to Defendants-Appellants by mailing a true and correct copy thereof to their attorneys of record at the address on file with the Clerk.

/s/ Laura Kabler Oswell

Laura Kabler Oswell