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GROWING PAINS: AN ARKANSAS CASE STUDY ON ADOLESCENT AUTONOMY AND ACCESS TO PUBERTY BLOCKERS FOR GENDER-AFFIRMING CARE

ABSTRACT

Arkansas Act 626 outlaws any gender-affirming medical treatment for persons under eighteen years of age.¹ This Note focuses on the evolving litigation surrounding Arkansas Act 626, the potential repercussions of the issues facing transgender adolescents, and the legal protections that may be implemented whether or not Arkansas Act 626 is upheld as a constitutional piece of legislation. It begins by examining the standard bases for administering puberty blocker treatments and addressing many of the misconceptions in medical treatment that have influenced the shaping of legislation on transgender healthcare. The Note discusses the current legal barricades for adolescents trying to access puberty blockers and then proceeds to suggest alternative routes to puberty blocker access should Arkansas Act 626 be upheld or even denied. Overall, the Note chooses to highlight how the personhood and dignity of transgender minors is on the line, and how decision-making autonomy should be afforded to minors in making decisions regarding the trajectory of the bodies they must inhabit.

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INTRODUCTION

In 2021, the Arkansas legislature passed Act 626 over Governor Asa Hutchinson's veto.² Act 626 was "the first ever bill passed in the United States to outlaw any gender-affirming medical treatment for persons under eighteen years of age."³ Coined as the "Save Adolescents from Experimentation Act," the Bill gave several reasons for outlawing such medical treatment.⁴ Such reasons included that "[o]nly a small percentage of the American population experiences distress at identifying with their biological sex' and '[e]ven among people who have undergone inpatient gender reassignment procedures, suicide rates, psychiatric morbidities, and morality rates remain markedly elevated above the background population."⁵ Thus, the law banned "providing gender transition procedures' (including the prescription of puberty blockers or 'cross-sex hormones') . . . 'gender reassignment surgery, as well as referring any patient to another healthcare professional for such matters.'"⁶

On March 9, 2021, the Bill gained approval by the Public Health, Welfare, and Labor Committee.⁷ Testifying supporters of the Bill, like Joseph Backholm of Washington, D.C., suggested that "doctors encouraged gender reassignment as a way to make money."⁸ The Bill passed the House in a seventy–twenty–two vote, largely along party lines, with eight congressional members choosing not to vote.⁹

2. See *id.*; Lindsey Dawson, Jennifer Kates & MaryBeth Musumeci, *Youth Access to Gender Affirming Care: The Federal and State Policy Landscape* (June 1, 2022), <https://www.kff.org/other/issue-brief/youth-access-to-gender-affirming-care-the-federal-and-state-policy-landscape> [<https://perma.cc/Z3ZZ-NKQ5>].

3. *Act 626 of 2021*, CENT. ARK. LIBR. SYS. ENCYC. OF ARK. (last updated Sept. 8, 2023), <https://encyclopediaofarkansas.net/entries/act-626-of-2021-15789> [<https://perma.cc/VJH2-C98W>].

4. See *id.*

5. *Id.* (quoting H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021)).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Act 626 of 2021*, *supra* note 3.

In a surprising move, Governor Hutchinson vetoed the Bill, shocking the state of Arkansas after “already sign[ing] other bills directed against trans persons,” including legislation banning “transgender athletes from participating in girls’ or women’s sports, as well as the so-called ‘Medical Ethics and Diversity Act,’ which allows healthcare workers and insurance companies to refuse non-emergency medical services to individuals on the basis of the ‘exercise of the right of conscience.’”¹⁰ Governor Hutchinson publicly stated, “I do hope my veto will cause my Republican colleagues across the country to resist the temptation to put the state in the middle of every decision made by parents and healthcare professionals.”¹¹ The next day, the legislature overrode the veto seventy-five–twenty-five in the House and twenty-five–eight in the Senate.¹² The American Civil Liberties Union promptly promised to file suit.¹³

In May 2021, four families of transgender youth and two physicians challenged the Arkansas law in federal court in *Brandt v. Rutledge*.¹⁴ The plaintiffs argued that the law is illegal sex discrimination under the Fourteenth Amendment’s Equal Protection Clause, that the law violates parents’ right to autonomy under the Due Process Clause, and that it violates the families and physicians’ right to free speech under the First Amendment.¹⁵ A preliminary injunction was granted in August of 2021, temporarily blocking the state from enforcing the law while the case was pending.¹⁶ The Court found that the plaintiffs were likely to succeed on their constitutional claims, and that the law was not substantially related to the state’s interest in protecting children or regulating physicians’ ethics because the law allows the same medical treatments for cisgender minors.¹⁷ The Court also found that the plaintiffs “will suffer irreparable harm” if the law is not blocked.¹⁸ After denying the State’s motion to dismiss the case, the State appealed both of those decisions to the Eighth Circuit, which affirmed the lower court’s decision.¹⁹ Finally, in June 2023, Judge Moody officially ruled on *Brandt*, deeming Arkansas Act 626 unconstitutional for violating the First

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 668 (8th Cir. 2022).

15. *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 888, 892–93 (E.D. Ark. 2021), *aff’d sub nom. Brandt ex rel. Brandt v. Rutledge* 47 F.4th 661 (8th Cir. 2022).

16. *Id.* at 894.

17. *See id.* at 891.

18. *See id.* at 892.

19. *See Brandt*, 47 F.4th at 672.

Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fifth and Fourteenth Amendments.²⁰ Likely anticipating an appeal however, the landmark decision is far from over.²¹ Thus, Arkansas will need to take steps to protect the right of transgender youths to make decisions regarding their own healthcare and pursuit of puberty blockers with the guidance of their physicians. This Note will argue for the importance of enacting judicial bypass laws for minors' access to puberty blockers in order to protect the lives of transgender youth.

Part I will discuss the general standard requirements and procedures for accessing transitional hormone therapy in adolescents. Part II will then discuss misconceptions within the administration of transgender hormone therapy that led to the creation and support for Arkansas Act 626. Part III will explore legal barriers and regulatory standards that create barriers between adolescents and access to transitional hormone therapy. Next, Part IV will discuss the potentiality of applying judicial bypass laws to adolescent hormone therapy access. Part V will take a look at the state of judicial bypass laws in Arkansas, inherent issues in the functionality of judicial bypass laws, and alternative measures to judicial bypass laws. Part VI will explore federal measures that can provide potential protection for gender-affirming care in Arkansas. Part VII will explore the trajectory of *Brandt v. Rutledge* and the ways in which the bench approached its decision to strike down Arkansas Act 626. Finally, Part VIII will discuss the continuing impact of anti-trans legislation on the nation at large if judicial measures do not instill protections.²²

I. BACKGROUND ON TRANSITIONAL HORMONE THERAPY IN ADOLESCENTS

The World Professional Association of Transgender Health Standards of Care (WPATH SOC) for the Health of Transsexual, Transgender, and Gender-Nonconforming People establishes the most recognized protocol for treating Gender Identity Disorder (GID).²³ This professional society outlines the stages of treatment

20. Daniel Breen, *First in the Nation Gender-Affirming Care Ban Struck Down in Arkansas*, NPR (last updated June 20, 2023, 9:58 PM EST), <https://www.npr.org/2023/06/20/1183344228/arkansas-2021-gender-affirming-care-ban-transgender-blocked> [https://perma.cc/2T8W-6EU5].

21. Arkansas Attorney General Tim Griffin announced his intention to appeal to the Eighth Circuit in a Twitter post. *See id.*

22. *See Brandt*, 47 F.4th at 671–72.

23. Federica Vergani, Comment, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 FIU L. REV. 903, 907 (2019).

for individuals with GID, starting with deep research of “‘psychological, family[,] and social issues’ by a mental health professional”; this is followed by reversible and then irreversible physical interventions.²⁴ WPATH SOC establishes two sets of criteria for adults and minors to satisfy before physical intervention: eligibility and readiness.²⁵ Criteria for hormone therapy are different for adults and minors, while criteria for sex-reassignment surgery are the same.²⁶ Hormone therapy begins with puberty blockers until the age of sixteen when the individual can then start taking cross-sex hormones.²⁷

Puberty blockers (gonadotropin-releasing hormone (GnRH)) are medications that suppress puberty, pausing “the bodily changes that would normally occur during puberty by suppressing the body’s production of testosterone or estrogen.”²⁸ Much debate exists as to the safety and soundness of such treatments, as well as to the appropriate age and circumstances under which such puberty blockers can and should be taken.²⁹

II. ARKANSAS ACT 626: MISUNDERSTANDINGS OF TRANSGENDER MEDICAL PROCEDURES

The case of *Brandt v. Rutledge* helps us understand some of the underlying misinformed perceptions of transgender medical treatments.³⁰ Such perceptions make it clear that states must take action to instill protections for transgender access to puberty blockers.³¹ In *Brandt*, plaintiffs, including transgender youths, their parents, and two healthcare professionals, filed a complaint seeking a declaratory judgment and injunctive relief from Arkansas Act 626.³² First, the plaintiffs alleged that Act 626 violates the Equal Protection Clause of the Fourteenth Amendment by discriminating against the minor plaintiffs “on the basis of sex and transgender status.”³³ Second, the “Parent Plaintiffs” also alleged that the Act violated the Due Process Clause of the Fourteenth Amendment “by limiting their fundamental right to seek and follow medical advice for their children.”³⁴

24. *Id.*

25. *See id.*

26. *Id.*

27. *Id.* at 922.

28. *Id.* at 908.

29. *See infra* notes 53–54 and accompanying text.

30. *See Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 671 (8th Cir. 2022).

31. *See id.*

32. *Id.* at 668.

33. *Id.*

34. *Id.*

Lastly, plaintiffs alleged that a ban on puberty blockers “violates their First Amendment rights by limiting what Physician Plaintiffs can say and what Minor and Parent Plaintiffs can hear.”³⁵

In the case, “[b]oth parties provided scientific literature and declarations from medical experts and discussed the expert opinions in their briefs and at the motion hearing.”³⁶ The State’s experts set out to “criticize the structure and scale of research on hormone therapies for adolescents with gender dysphoria.”³⁷ Attempts to undermine the validity of medical research surrounding hormone therapy for adolescents is common across the wave of anti-trans legislation in the South.³⁸ For example, many try to fuel the narrative that *puberty blockers are irreversible*.³⁹ However, puberty blockers just suppress the body’s production of testosterone or estrogen, giving “the child, the child’s doctor, and the child’s family time to explore and consider whether the child truly wishes to transition.”⁴⁰ In fact, puberty blockers are recommended for GID treatment by WPATH SOC because they are completely reversible interventions.⁴¹ This reversibility helps reduce the risks of administering the medication to a child who was misdiagnosed as having GID.⁴²

Additionally, many falsely believe that psychotherapy is sufficient to cure gender dysphoria.⁴³ While counseling and supportive therapy “may help reduce distress related to gender dysphoria” it does not “get at the heart of the problem—the development of unwanted permanent secondary sex characteristics.”⁴⁴ Psychotherapy can be helpful, “but only physical interventions like puberty-suppressing hormonal treatment can allow individuals to ‘buy time’ to think about their gender identity.”⁴⁵

As false narratives about the impact of GID treatment continue to spread, it becomes easier to turn a blind eye to the negative impacts of denying minors the ability to begin transitioning. Gender dysphoria is classified as a mental disorder in the Diagnostic and

35. *Id.*

36. *Brandt*, 47 F.4th at 670.

37. *Id.*

38. See Jessica Matsuda, Note, *Leave Them Kids Alone: State Constitutional Protections for Gender-Affirming Healthcare*, 79 WASH. & LEE L. REV. 1597, 1617 (2022).

39. See *id.*

40. Vergani, *supra* note 23, at 908.

41. *Id.*

42. See *id.*

43. See Emily Ikuta, Note, *Overcoming the Parental Veto: How Transgender Adolescents Can Access Puberty-Suppressing Hormone Treatment in the Absence of Parental Consent Under the Mature Minor Doctrine*, 25 S. CAL. INTERDISC. L.J. 179, 191 (2016).

44. See *id.*

45. *Id.*

Statistical Manual of Mental Disorders 5 (DSM-5).⁴⁶ As children with gender dysphoria grow up and become more self-aware, they start to evaluate and analyze their own gender compatibility leading to feelings of discomfort and despair.⁴⁷ And as they continue to age, the anxiety increases as they have to face the “adverse consequences of living with a self-concept that is never socially acknowledge[d] or reinforced.”⁴⁸ The stress of forcing minors with GID to undergo puberty instead of allowing them to take puberty blockers leads to significant stress that puts the minors “at high risk of violence, suicide, and substance abuse.”⁴⁹ Indeed, “[s]uicide rates are two to three times higher among LGBT[Q] youth.”⁵⁰ Transgender minors “are exposed to much higher levels of school-based violence, including being threatened or injured with a weapon at school, than their cisgender peers.”⁵¹ Further, “93% worry about access to gender-affirming medical care for transgender people while 83% worry about transgender people being denied the ability to play sports” due to the wave of anti-trans legislation across the country.⁵² It is no mystery why denial of proper treatment can lead to anxiety, depression, and confusion.⁵³

Lastly, there is existing momentum for arguments suggesting that hormone treatments are not as thoroughly researched as other medical procedures and thus, this might give reason for us to have less confidence in their long-term impacts.⁵⁴ But evidence in the *Brandt* record showed “that these hormone treatments have been evaluated in the same manner as many other medical innovations.”⁵⁵

The cumulation of these misconceptions poses immense physical health risks to minors who are denied access to treatment.⁵⁶ Without safe and legal access to puberty blockers, minors won’t stop seeking treatment, they will just turn elsewhere.⁵⁷ Minors will try

46. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013).

47. *Id.* at 457–58; see also Vergani, *supra* note 23, at 928.

48. Vergani, *supra* note 23, at 924.

49. *Id.* (quoting Ikuta, *supra* note 43, at 212).

50. *Id.*

51. Kerith Conron, *The Arkansas Trial on Gender-Affirming Care Has Serious Implications for Trans Youth Across the U.S.*, TIME (Oct. 21, 2022, 10:22 AM EDT), <https://time.com/6223578/arkansas-trial-trans-youth-gender-affirming-care> [<https://perma.cc/K7Z4-2X7L>].

52. *Id.*

53. See *infra* Part II.

54. Allison Parshall, *What Are Puberty Blockers, and How Do They Work?*, SCI. AM. (May 1, 2023), <https://www.scientificamerican.com/article/what-are-puberty-blockers-and-how-do-they-work> [<https://perma.cc/ZJ5V-QU3U>].

55. *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 671 (8th Cir. 2022).

56. See Vergani, *supra* note 23, at 926.

57. See *id.*

to initiate transition on their own without supervision or assistance by physicians.⁵⁸ This may lead to the child attempting to “obtain medication [from] the illegal market[,]” exposing themselves to the dangers of unsupervised drugs.⁵⁹ According to the San Francisco Department of Public Health, “thirty percent of male-to-female individuals surveyed who had taken hormones in the last six months had acquired them illegally.”⁶⁰ Not only can the minor face health complications, but this could also lead to criminal charges and proceedings.⁶¹

Additionally, waiting on sex reassignment until adulthood can make transitioning far more difficult than starting the process prior to puberty.⁶² Developing secondary sex characteristics—Adam’s apple, hips, and breasts—can become permanent if not managed from the early stages.⁶³ Further, studies have confirmed that across dozens of countries, “the age of puberty in girls has dropped by about three months per decade since the 1970s.”⁶⁴ A similar but less extreme reality is observed in boys.⁶⁵ Thus, delaying early intervention can be more difficult, more expensive, and more invasive.⁶⁶

Such falsehoods and physical dangers only strengthen the argument that it is imperative to the safety, stability, and health of transgender youths to ensure that they have access to puberty blockers. Widespread misperceptions fuel the fire for persons seeking to put bars in place for proper transgender medical treatment. Without necessary protections, transgender youths are at greater risks to mental and emotional harm that extends far beyond the physical harm of denying access to puberty blockers.⁶⁷

III. BARRIERS TO TREATMENT

In conjunction with misconceptions about puberty blockers come barriers to obtaining such treatments for transgender youths. Across the United States, “[a]ll states require parental consent for

58. *Id.*

59. *Id.* (alteration in original) (quoting Ikuta, *supra* note 43, at 213).

60. *Id.*

61. *See id.*

62. Vergani, *supra* note 23, at 922.

63. *See id.* at 926.

64. Azeen Ghorayshi, *Puberty Starts Earlier Than It Used To. No One Knows Why.*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/05/19/science/early-puberty-medical-reason.html?smid=nytcore-ios-share&referringSource=articleShare> [https://perma.cc/NG78-CNGM].

65. *Id.*

66. Ikuta, *supra* note 43, at 213.

67. *See* Vergani, *supra* note 23, at 928.

most medical care provided to minors, and many courts adopt the view that a minor child cannot consent to medical or surgical treatment.”⁶⁸ WPATH SOC sets a high bar for eligibility for transition-related treatment.⁶⁹ This most often comes to light in decisions that involve courts attempting to resolve disputes between parents who are separated or divorced and who do not agree about the best way to handle their child’s gender nonconformity.⁷⁰ There is existing evidence that in custody cases, transgender adolescents may face challenges in the form of bias and misunderstanding by judges regarding gender dysphoria.⁷¹ For example, in *Smith v. Smith*, the Ohio court decided a custody dispute involving a nine-year-old child assigned as a male at birth who expressed a strong desire to live as a girl.⁷² The Court upheld custody to the father after falsely presuming that the mother was harming the child by supporting them in their gender nonconformity.⁷³ *Smith* exemplifies the “best interests of the child” standard.⁷⁴ This standard “gives courts extraordinary latitude in determining what the court believes is in the child’s ‘best interests’ in light of all the factors which could adversely or beneficially affect the child.”⁷⁵

The issue with the “best interests of the child” standard is that it does little, if anything, to account for the autonomy of the minor in question.⁷⁶ Because minors are not considered to be fully cognitively developed nor to have reached a level of certain maturity, courts do not grant them the power to take responsibility for some of the decisions that will have the longest lasting impacts on their lives.⁷⁷ This notion denies a child’s inner being, knowing that they do not feel safe or aligned within the body that they exist in. It strips children of the dignity that comes with getting to choose how they express themselves in society. And it rids children with GID of the right to feel at peace and at home in their own bodies, a right afforded naturally to all other persons who do not face gender dysphoria. For such reasons, it is necessary that Arkansas enact judicial bypass laws to allow transgender youths access to puberty blockers in order

68. Ikuta, *supra* note 43, at 187 (footnotes omitted).

69. *See id.*

70. *See id.*

71. *Id.*

72. *Smith v. Smith*, 2007-Ohio-1394, ¶ 1.

73. *See id.* ¶ 80.

74. Ikuta, *supra* note 43, at 193.

75. *Id.*

76. *See id.* at 192–93.

77. Bella Mancini Pori, Note, “What Makes You Think You Can Do That?": How Venue Restrictions Prevent Access to Abortion for Minors in Arkansas, 42 CARDOZO L. REV. 685, 714–15 (2021).

to afford them the dignity and liberty to feel connected within their own bodies and identities.

IV. JUDICIAL BYPASS LAWS FOR ACCESS TO PUBERTY BLOCKERS

A judicial bypass law typically refers to a law regarding minors' access to abortion.⁷⁸ Such laws involve minors asking judges to give them permission to get an abortion without involving a parent or legal guardian.⁷⁹ This usually involves going to court to file a petition before setting up a meeting to talk to the judge.⁸⁰ Most often, a minor can involve a parent when an unplanned pregnancy occurs and the parental involvement statute will not create issues.⁸¹ Such judicial bypass laws benefit minors who "fear physical or emotional abuse, being kicked out of the home, alienation from their families or other deterioration of family relationships, or being forced to continue a pregnancy against their will."⁸² However, "the Constitution requires states to provide processes where minors can request that a court waive the parental consent requirement."⁸³ This requirement is in place for "minors in abusive homes, survivors of incest, foster children, or those who do not trust their parents," all of which the parental involvement statutes create a barrier to a constitutional right.⁸⁴

Bellotti v. Baird establishes the test that grants minors authorization for an abortion.⁸⁵ Obtaining an abortion for a minor requires: "(1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests."⁸⁶

Federica Vergani breaks down how this test could be applied to "an adolescent seeking authorization from a court to take puberty

78. *What Is a Judicial Bypass?*, IF WHEN HOW: JUDICIAL BYPASS WIKI (2023), <https://judicialbypasswiki.ifwhenhow.org/about-the-wiki/what-are-judicial-bypass-processes> [<https://perma.cc/CWY7-VKML>].

79. *See id.*

80. *Id.*

81. *See Pori, supra* note 77, at 687.

82. HUMAN RTS. WATCH & ACLU ILL., "THE ONLY PEOPLE IT REALLY AFFECTS ARE THE PEOPLE IT HURTS": THE HUMAN RIGHTS CONSEQUENCES OF PARENTAL NOTICE OF ABORTION IN ILLINOIS 1–2 (2021), <https://www.hrw.org/report/2021/03/11/only-people-it-really-affects-are-people-it-hurts/human-rights-consequences> [<https://perma.cc/X2ZH-SWAS>].

83. Pori, *supra* note 77, at 687.

84. *Id.*

85. *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

86. *Id.* (footnotes omitted).

blockers without having to provide parental notice or consent.”⁸⁷ Starting with the first part of the test, minors are as young as nine years old when they qualify to take puberty blockers.⁸⁸ Thus, Vergani argues that the portion of the *Bellotti* Test “that requires the minor to show they are mature enough to make their decision independently is not applicable.”⁸⁹ In fact, WPATH SOC has its own mechanism to “account for children’s mental and psychological developmental differences.”⁹⁰ Minors must show long-lasting and intense patterns of gender nonconformity, prove that their GID came on or grew worse with puberty, and show that they do not have any other mental or physical issues that would interfere with treatment.⁹¹ Thus, minors that want to start puberty blockers would only be able to obtain court authorization after acquiring their physician’s authorization.⁹² And acquiring that physician authorization without parental assistance would prove to be immensely difficult for minors.

For the second part of the test, Vergani argues that allowing puberty blockers would be in the child’s best interest because “denying minors the ability to take puberty blockers prior to undergoing puberty has both medical and financial repercussions.”⁹³ The benefits of allowing puberty blockers for minors include relief of gender dysphoria, better psychological and physical outcomes, buying them more time to determine whether they truly want to transition, and allowing for “greater diagnostic precision” as minors and their doctors continue to explore the minor’s gender identity and desire for reassignment.⁹⁴ These benefits provide strong support that allowing judicial bypass laws for puberty blockers is indeed in the best interest of the child.

Furthermore, as stated in the beginning of this section, judicial bypass laws were created with the intention of providing minors who may have adverse home life circumstances with access to a constitutionally protected right.⁹⁵ Such circumstances are equally relevant for minors seeking access to puberty blockers. The intention and purpose of judicial bypass laws is applicable and cohesive with the needs of transgender youth: individuals who may also come

87. Vergani, *supra* note 23, at 919.

88. *Id.*

89. *Id.*

90. *Id.* at 921.

91. *See id.*

92. *See id.*

93. Vergani, *supra* note 23, at 922.

94. *Id.* at 923.

95. Judicial bypass laws are designed to ensure methods exist to bypass statutes requiring parental consent. *See Pori, supra* note 77, at 687.

from abusive homes or have parents who they do not trust or feel comfortable approaching about their own gender dysphoria.

V. ACHIEVING MINORS' ACCESS TO PUBERTY BLOCKERS IN ARKANSAS

A. State of Judicial Bypass Laws in Arkansas

While judicial bypass laws are an existing mechanism in Arkansas, they are not necessarily accessible or easy to come by due to Arkansas's venue restrictions.⁹⁶ Bella Mancini Pori details an example regarding a pregnant seventeen-year-old in Benton, Arkansas, and a pregnant seventeen-year-old in Roland, Arkansas.⁹⁷ Benton "has access to over a dozen doctors' offices, several charities, and an adoption agency."⁹⁸ Roland "boasts mostly churches and farms; the town does not even have a courthouse."⁹⁹ The minors must file a petition for a judicial bypass in their county of residence in order to obtain an abortion without parental consent.¹⁰⁰ However, "[t]he county line between Benton and Roland means that the seventeen-year-old in Roland will have access to a judge who is familiar with the judicial bypass process," allowing that minor to consent to her own abortion, meanwhile the minor in Benton will have to get her parents' consent or carry the pregnancy to term.¹⁰¹

Such venue restrictions on Arkansas's judicial bypass accessibility put an "insurmountable obstacle" in place for minors seeking abortions in certain counties.¹⁰² Pori conducted a telephone study in Arkansas revealing that "only eight out of Arkansas's seventy-five circuit courts were able or willing to provide information about the judicial bypass procedure."¹⁰³ Thus, the majority of minors are not able to access a judicial bypass due to the lack of information from Arkansas circuit clerks.¹⁰⁴

It is easy to imagine how a similar issue would exist for trans adolescents if judicial bypass laws were implemented for access to puberty blockers in Arkansas. If adolescents are bound to their county of residence, they may be forced to file a petition with a judge

96. *See id.* at 686–87.

97. *Id.* at 686.

98. *Id.*

99. *Id.*

100. *Id.* at 686–87.

101. Pori, *supra* note 77, at 687.

102. *Id.* at 689.

103. *Id.*

104. *See id.* at 690.

who is either not educated on judicial bypass laws, not educated on the applicability of judicial bypass laws to puberty blocker access, or who refuses to recognize judicial bypass laws as a viable pathway to puberty blocker access. Further, the county division lines create disparate impacts within the state based on geography that would lead to unequal application of judicial bypass laws for minors.¹⁰⁵

B. Overarching Issues with Judicial Bypass Court Experiences for Adolescents

Even if judicial bypass laws were carried out in an organized and fair fashion, minors overwhelmingly respond that the process of going to court for a bypass hearing is “a very frightening, nerve-racking, and humiliating experience.”¹⁰⁶ Many minors who appear in court “are often exhausted They talk about feeling that they don’t belong in the court system, that they are ashamed, embarrassed and somehow that they are being punished for the situation they are in.”¹⁰⁷ The Massachusetts Supreme Judicial Court has concluded that the “judicial bypass process can be traumatic for a young woman.”¹⁰⁸

Hofstra Law student Satsie Veith goes as far as to suggest that the judicial bypass procedure is in fact “an example of the victimization of children.”¹⁰⁹ Veith believes that the true, underlying purpose of the judicial bypass process is the “exercise of adult control of children, and particularly adult manipulation of children—made possible by children’s political and legal vulnerability—to make political points: in this case, to take the brunt of political efforts to block abortion rights.”¹¹⁰ Thus, bypass options may do little to provide protections for minors but instead “become a rubber stamp by which states ‘constitutionalize’ statutes which function only as burdens” on adolescents.¹¹¹

The dominant fear shared by women facing the bypass hearing process is that they may be denied consent and forced to bear their

105. *See id.* at 727–28.

106. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN’S L.J. 61, 173 (2003).

107. *Id.* (alteration in original) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 441 n.29 (1990)).

108. *Id.* at 173–74 (quoting *Planned Parenthood League of Mass., Inc. v. Att’y Gen.*, 677 N.E. 2d 101, 105 (Mass. 1997)).

109. Satsie Veith, Note, *The Judicial Bypass Procedure and Adolescents’ Abortion Rights: The Fallacy of the “Maturity” Standard*, 23 HOFSTRA L. REV. 453, 474 (1994).

110. *Id.*

111. *Id.* at 477.

child.¹¹² And while this fear may be particular to female adolescents facing abortions, the overarching anxieties that minors face in dealing with the court system can hold true for transgender minors seeking access to puberty blockers as well.¹¹³ Many minors hold a deep fear that they will not be able to convince the judge of something that they know to be true—that they are indeed mature enough to make their own decision.¹¹⁴ And being cognizant of the fact that the judge hearing the case holds immense power over their lives creates a sense of powerlessness for minors before the authority of the court.¹¹⁵ Attorney Leah Bruno once explained:

These young women are required to go to court, appear before a judge, and be sworn in at the beginning of a hearing in the very same way they hear about [happening in a criminal trial] So many of these young women have to sneak out of school and classes to do this. It's all the wrong messaging. They are taking responsibility for their lives but being made to feel like they should be penalized for it.¹¹⁶

Minors also take issue with “the logic of placing this authority in the hands of a total stranger.”¹¹⁷ Can someone with no knowledge of the minor’s situation properly assess their maturity or readiness for motherhood or puberty blockers?¹¹⁸ Adolescents and judges alike raise this concern.¹¹⁹ For example:

In 1996, an Alabama judge denied a young woman’s petition for a judicial bypass, in part because her “action in becoming pregnant in light of sex education in the schools and the extreme amount of publicity about teen pregnancy is indicative that she has not acted in a mature and well informed manner.”¹²⁰

Understandably, the loss of privacy stands as a major fear for minors.¹²¹ Many adolescents have “expressed shame over how a decision

112. Ehrlich, *supra* note 106, at 174.

113. *See id.*

114. *Id.*

115. *Id.* at 142, 174.

116. HUMAN RTS. WATCH & ACLU ILL., *supra* note 82, at 52 (alteration in original) (quoting Telephone Interview with Leah Bruno (Sept. 14, 2020)).

117. Ehrlich, *supra* note 106, at 174.

118. *Id.*; see Abbey Marr, *Judicial Bypass Procedures: Undue Burdens for Young People Seeking Safe Abortion Care*, ADVOCATES FOR YOUTH (June 16, 2015), <https://www.advocatesforyouth.org/resources/policy-advocacy/judicial-bypass-procedures> [https://perma.cc/KA5Y-GLBR].

119. Ehrlich, *supra* note 106, at 174.

120. Marr, *supra* note 118 (quoting *In re Anonymous*, 684 So. 2d 1337, 1338 (Ala. Civ. App. 1996)).

121. *See* Ehrlich, *supra* note 106, at 174.

that was so private had been placed in the public domain for others to see and judge.”¹²² Stripping minors of their privacy regarding an intimate part of their lives not only creates long-lasting distrust in the legal system, but it has the ability to leave the minor with deep-seated emotional pain and trauma.¹²³

C. Proposed Solutions to Making Judicial Bypass Laws More Equitable

If Arkansas is to move forward with judicial bypass laws as an avenue creating access to puberty blockers for minors, the state will need to implement several reforms and measures to the current condition of existing judicial bypass laws in order to prevent harm to minors. First, Arkansas needs to revise its venue requirement for judicial bypass laws.¹²⁴ Instead of requiring minors to file a petition for judicial bypass in the county of their residence, a minor should be able to file an application in any county within the state.¹²⁵ Removing the venue requirement would ensure that no child is barred from accessing judicial bypass proceedings solely based on their geography and the judge’s familiarity with judicial bypass procedures within their given county.¹²⁶ An issue that might arise with the ability to seek a petition in another county is a child’s ability to travel to another courthouse in another county. Many minors are not licensed to drive nor able to own a vehicle, and thus, are unfairly disadvantaged in their ability to make a trip to a neighboring county’s courthouse.¹²⁷ To prevent inaccessibility due to travel, the state should offer judicial bypass applications online and allow for mail-in petitions and a method for submitting petitions online. Not only would this broaden accessibility, but it would also make the system more streamlined and efficient by collecting judicial bypass applications in an organized online queue.

Second, Arkansas must implement an enforcement mechanism against judges who refuse to hold a hearing or make a ruling within the prescribed time period of the judicial bypass application.¹²⁸ To overcome this issue, Arkansas should adopt an expedited motion procedure to be filed directly with the Supreme Court of Arkansas.¹²⁹

122. *Id.*

123. *See id.*

124. Pori, *supra* note 77, at 726.

125. *Id.*

126. *See id.*; *supra* Part IV.

127. Pori, *supra* note 77, at 720.

128. *See* Wendy-Adele Humphrey, *Two-Stepping Around a Minor’s Constitutional Right to Abortion*, 38 CARDOZO L. REV. 1769, 1799–1800 (2017).

129. *See id.* at 1800.

In situations where the non-compliance results from the refusal to hold a hearing or to rule after a hearing, the highest civil court in the state is in the best position to act.¹³⁰ This procedure should be followed by the appointment of a new judge by the court or a regional presiding judge.¹³¹ The time element for minors trying to get puberty blockers is crucial, as such treatments are only effective during a certain window of the minor's adolescence.¹³² Not only would this measure allow for more security that minors will receive their treatment in a timely manner, but it might help solve the venue issue at the root cause, making it an effective recommendation.¹³³

Lastly, in order to preserve the privacy and dignity of minors, judicial bypass laws need to be amended to instill protections for the minor's anonymity throughout the judicial bypass process.¹³⁴ In order to be fully effective, a bypass law must "be completed with anonymity."¹³⁵ Without such guarantee, the "minor's parents might find out about her decision and as a result, the minor may be prevented from completing a judicial bypass application or from even visiting a physician."¹³⁶ As such, the consequence of losing anonymity might be a de facto veto of a minor's right to decide whether to use puberty blockers or not.¹³⁷

To be clear, "anonymity" is what is crucial here, not "confidentiality."¹³⁸ "Anonymous" typically refers to an individual and means the individual is 'not named or identified,' while 'confidential' refers to information that is 'meant to be kept secret; imparted in confidence.'¹³⁹ Often, statutes will interchange the two words, thus not ensuring that it is the minor's actual identity that remains protected.¹⁴⁰ If a minor decided to obtain puberty blockers without parent involvement, "the ability to maintain her utmost privacy throughout the process is vital."¹⁴¹ Adolescents are often "fearful that others will find out about their decision, and their safety may

130. *Id.*

131. *See id.*

132. *See id.*; Parshall, *supra* note 54 ("Puberty has a . . . window, which typically . . . lasts from two to five years. Blockers are usually prescribed once puberty has already begun . . .").

133. *See* Humphrey, *supra* note 128, at 1813.

134. *See id.* at 1805.

135. *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 644 (1979)).

136. *Id.* at 1805.

137. *Id.*

138. *Id.*

139. Humphrey, *supra* note 128, at 1805 (footnotes omitted) (citing BLACK'S LAW DICTIONARY (10th ed. 2014)).

140. *See id.* at 1805–06.

141. *Id.* at 1807.

turn on whether or not they can pursue judicial bypass confidentially and with anonymity.”¹⁴²

While Arkansas does use the terms “anonymity” and “confidential” according to their plain meanings (“i.e., the judicial bypass law explains that ‘court proceedings . . . shall be confidential and shall ensure the anonymity of the minor’”), language that more accurately outlines measures to protect such anonymity is crucial.¹⁴³ For example, the judicial bypass laws should allow for the minor to use a pseudonym or just their initials on any documents.¹⁴⁴ Further, physical courthouse presence may also contribute to a minor’s identity being compromised.¹⁴⁵ Particularly, if minors are required to appear in person to court in a populous county where they are likely to be recognized, their identity is at much higher risk of being compromised.¹⁴⁶ As such, Arkansas should make electronic forms and instructions available as well as the use of videoconferencing, telephone conferencing, or any other remote electronic means.¹⁴⁷

In addition to these anonymity protective measures, Arkansas courts should also seal records and limit those who may participate in the proceedings.¹⁴⁸ This is because of the likelihood that minors’ identities are compromised through appeal despite being protected at the trial court level.¹⁴⁹ Identities get revealed on appeal “when an appellate opinion incorporates so much factual information from the trial record that despite the Jane Doe alias, the petitioner’s identity is susceptible to discovery.”¹⁵⁰ Thus, the above-mentioned measures would ensure that the inclusion of factual information would not be subject to exposure beyond personnel approved to handle the court records.¹⁵¹ The totality of these proposed amendments would strengthen the integrity of the proceedings and heal the inequities embedded in the current Arkansas judicial bypass laws.¹⁵²

D. Alternatives to Judicial Bypass Laws

Several states have enacted statutes that “expand the options for young women who cannot involve their parents by providing a

142. *Id.*

143. *Id.* (quoting ARK. CODE ANN. § 20-16-809(b)(4)(A) (2015)).

144. *See id.* at 1794.

145. Humphrey, *supra* note 128, at 1810.

146. *See id.* at 1810–11.

147. *See id.* at 1810.

148. *Id.* at 1811.

149. *Id.*

150. *Id.* (quoting Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 441 (2009)).

151. Humphrey, *supra* note 128, at 1811.

152. *See id.*

legal role for designated relatives and/or professionals.”¹⁵³ These laws were intended to be “legislative compromises between anti-choice and pro-choice legislators.”¹⁵⁴ In considering providing legal protections for transgender minors, Arkansas should consider enacting several of the following measures that have proven to be useful in other states and apply them to the measures intended to increase accessibility to puberty blockers for transgender youths.¹⁵⁵

1. *The Adult-Relative Alternative*

“Adult-Relative” Alternative laws are intended to permit “designated family members to receive notice of or grant consent for the abortion in lieu of a bypass hearing.”¹⁵⁶ Maine and Wisconsin have created broad statutes for this alternative.¹⁵⁷ For example, Maine’s law allows for any adult family member to give consent while Wisconsin’s law allows for a grandparent, sibling, aunt, or uncle to give consent so long as that person is over the age of twenty-five.¹⁵⁸ Further, neither the Maine nor Wisconsin statutes “limit[] the circumstances under which these designated family members can give consent.”¹⁵⁹ Thus, enactment of a similar law in Arkansas that could then be adapted to transgender access to puberty blockers would be better suited for minors who struggle with parental relationships.¹⁶⁰ If Arkansas is unwilling to enact such a wide-sweeping law, it could instead enact a statute that is narrower in scope similar to Delaware or North Carolina.¹⁶¹ For example, in Delaware, only grandparents can be the designated relatives and additionally in North Carolina, “grandparents can consent only if the minor has lived with them for six months.”¹⁶²

2. *The Professional Alternative*

In several states, a professional—most commonly a doctor or mental health professional—is authorized to waive any parental

153. Ehrlich, *supra* note 106, at 175.

154. *Id.*

155. *See id.*

156. *Id.* at 176; *see also* *Parental Involvement in Minors’ Abortions*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortion> [https://perma.cc/MV7Y-4A2M] (last visited Nov. 13, 2023).

157. Ehrlich, *supra* note 106, at 176.

158. *Id.*

159. *Id.*

160. *See id.*

161. *Id.* at 176–77.

162. *Id.* at 177.

notice or consent requirement after determining “that the minor is mature or that notice would not be in her best interest, in lieu of seeking a waiver from the court.”¹⁶³ This alternative would relieve much of the discomfort and anxiety minors feel when approaching the court for judicial bypass hearings because the health professional essentially acts as the judge in arbitrating maturity and best interest.¹⁶⁴

3. *The Last Resort: Sanctuary States*

While providing in-state legal guarantees to puberty blockers in Arkansas is a necessary healthcare measure, reality suggests that looking outside the state borders may be the next best thing in the face of anti-trans legislatures.¹⁶⁵ California has just recently become a sanctuary for transgender youth traveling for medical care after introducing a new law that protects families traveling from places where there are efforts to criminalize gender-affirming care.¹⁶⁶ The law comes after efforts by states like Texas that use Family Protective Services to investigate transgender minors and parents of transgender kids.¹⁶⁷ Texas officials have even sought to investigate minors who have socially transitioned without any medical interference yet.¹⁶⁸ California legislatures wish to shield families from such abrasive investigations and provide them with safety and assurance that they will have access to hormones or puberty blockers within California’s borders no matter where they came from.¹⁶⁹ “We are going to provide them with refuge, and we’re not going to send them back, and we’re not going to honor subpoenas,” says California State Senator Scott Wiener.¹⁷⁰

California’s efforts to solidify itself as a sanctuary state does not come without some pushback from within the state.¹⁷¹ For example, Greg Burt of the conservative Christian California Family Council fears that children will regret transitioning.¹⁷² “We do not assume that your body is the problem. We think it’s much more logical to

163. Ehrlich, *supra* note 106, at 177.

164. *See id.*

165. *See* Lesley McClurg, Transcript of *A New Law in California Protects Transgender Youth Who Come for Medical Care*, NPR: ALL THINGS CONSIDERED (Oct. 28, 2022, 5:03 PM ET), <https://www.npr.org/2022/10/28/1132405391/a-new-law-in-california-protects-transgender-youth-who-come-for-medical-care> [<https://perma.cc/8BHU-GHBS>].

166. *Id.*

167. *See id.*

168. *See id.*

169. *Id.*

170. *Id.*

171. *See* McClurg, *supra* note 165.

172. *Id.*

encourage young people to try and get their minds to match their bodies[.]" he suggests.¹⁷³ He goes as far as to suggest that the new legislation violates the Constitution as well.¹⁷⁴ But Loyola Law School professor Jessica Levinson argues that "the weight of the law indicates that states are separate sovereigns. If and until there is a national standard that indicates, nobody can obtain gender-affirming care or nobody can obtain an abortion, the law allows for that patchwork."¹⁷⁵

VI. FEDERAL MEASURES TO PROTECT GENDER-AFFIRMING CARE FOR MINORS

As it becomes more evident that achieving protections for transgender youths on a state level through well-orchestrated judicial bypass laws may not be immediately achievable, federal agencies are encouraging transgender patients and their physicians to exercise their federal protections that are available right now.¹⁷⁶ On March 2, 2022, the Office for Civil Rights (OCR) in the Department of Health and Human Services (HHS) released "new guidance . . . on civil rights protections for transgender youth, their families, and providers that offer gender-affirming health care services."¹⁷⁷ This information explains how attempts to block transgender healthcare could violate federal nondiscrimination protections such as Section 1557 of the Affordable Care Act (ACA), the Rehabilitation Act, and the Americans with Disabilities Act.¹⁷⁸ A detailed examination of these federal statutes and how they may be used to support transgender minors in Arkansas seeking puberty blockers takes place below.

173. *Id.*

174. *Id.* Greg Burt opposes AB 957 (a California bill that would require a court to consider a parent's affirmation of the child's gender identity when determining the best interests of a child for contested child custody and visitation proceedings), stating that "[e]very parent has a God-given responsibility and a constitutionally protected right to direct the upbringing, education, and care of their own children. No one should lose custody of their children because their opinions or religious beliefs are unpopular with state politicians." Greg Burt, *CA Legislators Pass Bill to Take Children from Parent Who Doesn't Affirm Kid's Gender Identity*, CAL. FAM. COUNCIL (Sept. 11, 2023), <https://www.californiafamily.org/2023/09/ca-legislators-pass-bill-to-take-children-from-parent-who-doesnt-affirm-kids-gender-identity> [https://perma.cc/Z5RB-ZCPC].

175. McClurg, *supra* note 165.

176. Katie Keith, *HHS Issues Guidance to Help Protect Transgender Youth*, HEALTH AFFAIRS (Mar. 7, 2022), <https://www.healthaffairs.org/doi/10.1377/forefront.20220307.303712> [https://perma.cc/3HZ2-EPYC].

177. *Id.*

178. *Id.*

A. Section 1557

Section 1557 is the ACA's primary nondiscrimination provision and applies to any program or activity administered by a federal agency, as well as all entities established under Title I of the ACA.¹⁷⁹ Under this provision "an individual cannot be excluded from participation in, denied the benefits of, or subjected to discrimination based on race, color, national origin, age, disability, or sex by any health program or activity of which any part receives federal financial assistance."¹⁸⁰ It has further been established that HHS interprets sex discrimination to include discrimination based on gender identity and sexual orientation.¹⁸¹ Thus, transgender minors in Arkansas cannot be turned away from care, including gender-affirming care, based on their age or gender identity.¹⁸² Further, "covered entities cannot restrict a person's ability to receive medically necessary gender-affirming care solely because of their gender identity or sex assigned at birth."¹⁸³ The Biden administration is proposing new policies that would go beyond the scope of Section 1557's first establishment under the Obama administration in 2016.¹⁸⁴ Some of these policies include even further "[c]larifying the definition of sex and prohibiting discrimination based on marital, family, or parental status[.]" "[p]romoting compliance through new policies, procedures, and training[.]" and "[c]reating a process for entities to voice objections."¹⁸⁵ The fate of accepted updates to Section 1557 awaits litigation, but it comes at a necessary time when gender-affirming care across the country is at stake for transgender minors.¹⁸⁶

B. Section 504 and Title II

Section 504 of the Rehabilitation Act "prohibits discrimination based on disability in programs or activities that receive federal financial assistance, and Title II [of the Americans with Disabilities

179. *Id.*; Patient Protection and Affordable Care Act § 1557, 42 U.S.C. § 18116 (2010).

180. Keith, *supra* note 176; *see also* 42 U.S.C. § 18116(a) (2010).

181. Keith, *supra* note 176.

182. *Id.*

183. *Id.*

184. *See* Katie Keith & Timothy S. Jost, *New Antidiscrimination Rule Aims to Advance Health Equity and Ensure Protections for Transgender People*, COMMONWEALTH FUND: TO THE POINT (Aug. 10, 2022), <https://www.commonwealthfund.org/blog/2022/new-antidiscrimination-rule-aims-advance-health-equity-and-ensure-protections-transgender> [<https://perma.cc/QW2Z-ZWR6>].

185. *Id.*

186. *Id.*

Act] protects qualified individuals with disabilities from discrimination in state and local government programs.”¹⁸⁷ OCR argues that gender dysphoria could qualify as a disability under these laws.¹⁸⁸ As such, “restrictions that prevent individuals from accessing medically necessary care based on gender dysphoria . . . may also violate Section 504 and Title II of the ADA.”¹⁸⁹

C. Remedies

Filing complaints under these provisions is necessary because it allows OCR to conduct investigations and enforce the laws detailed above based on specific facts and circumstances.¹⁹⁰ While OCR has other tools, “complaints will help OCR target its action, conduct thorough investigations, and maximally enforce federal laws.”¹⁹¹

The Biden administration also has other options in its hands to help protect transgender youth, although debates still exist as to which one would be most effective.¹⁹² For example, The Administration for Children and Families could open a compliance review for the Arkansas Department of Children and Family Services.¹⁹³ Such actions could lead to an improvement plan and potential monetary penalties for misconduct.¹⁹⁴ Further, the Department of Justice could sue Arkansas for denial of puberty blockers to transgender minors or file further “statements of interest” in pending litigation, as it has done in the *Brandt* case.¹⁹⁵ Seeing the impact of the Department of Justice’s statement of interest in the final opinion in the *Brandt* case will provide further clarity as to whether such measures prove to be effective for transgender healthcare protection.¹⁹⁶

VII. THE TRAJECTORY OF *BRANDT V. RUTLEDGE* AND ITS IMPACTS

The viability of the above federal measures will be put to the test by the trajectory of *Brandt v. Rutledge*. On August 2, 2021, Judge James M. Moody of the U.S. District Court for the Eastern

187. Keith, *supra* note 176; Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (1973); 42 U.S.C. §§ 12131–12132.

188. Keith, *supra* note 176.

189. *Id.*

190. *See id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. Keith, *supra* note 176.

195. *Id.*; *see also* *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 887 (E.D. Ark. 2021).

196. *See infra* Part VII.

District of Arkansas held that State officials failed to meet their burden under the heightened scrutiny standard to show that the State had a compelling interest in infringing upon parents' right to seek medical care for their children, or that the Act was narrowly tailored to serve that interest.¹⁹⁷ The Court further held that the State failed to meet its burden under the strict scrutiny standard of showing that it had a compelling interest in preventing transgender minors from deciding to receive gender transition treatment with the support of their parents and healthcare providers.¹⁹⁸

Under heightened scrutiny, Act 626 must be substantially related to a sufficiently important governmental interest. A policy subject to intermediate scrutiny must be supported by an "exceedingly persuasive justification." The policy must serve important governmental objectives, and the government must show "that the discriminatory means employed are substantially related to the achievement of those objectives."¹⁹⁹

The Court held that Act 626 was not substantially related to protecting Arkansas children from experimental treatment or "regulating the ethics of Arkansas doctors and Defendant's purported health concerns regarding the risks of gender transition procedures . . . for all patients under 18 regardless of gender identity."²⁰⁰ If the State had held genuine concerns regarding health, they would have banned these procedures for all persons under the age of eighteen, regardless of gender identity.²⁰¹ The Court determined "[t]he State's goal in passing Act 626 was not to ban a treatment. It was to ban an outcome that the State deems undesirable."²⁰² Further, if Arkansas Act 626, which directly contradicts medical evidence that has been supported by rigorous study, is not enjoined, "providers in this State will not be able to consider the recognized standard of care for adolescent gender dysphoria."²⁰³ The Court also held that the Act would not allow physicians to abide by their ethical standards "which may include medically necessary transition-related care for improving the physical and mental health of their transgender patients."²⁰⁴ Lastly, under heightened scrutiny, the Court found that the plaintiffs

197. *Brandt*, 551 F. Supp. 3d at 893.

198. *Id.* at 889.

199. *Id.* at 889 (citations omitted) (quoting *United States v. Virginia*, 518 U.S. 515, 531, 533 (1996)).

200. *Id.* at 891.

201. *Id.*

202. *Brandt*, 551 F. Supp. 3d at 891.

203. *Id.*

204. *Id.*

will suffer irreparable harm if Act 626 is not enjoined by causing “irreparable physical and psychological harms to the Patient Plaintiffs by terminating their access to necessary medical treatment.”²⁰⁵ For example, plaintiffs who had already begun puberty blocking hormones “will be forced to stop the treatments which will cause them to undergo endogenous puberty,” and “[p]laintiffs who will soon enter puberty will lose access to puberty blockers.”²⁰⁶

In applying strict scrutiny to the fundamental right of the parents to seek medical care for their children, the Court found that the State did not show that Act 626 served the stated goal of protecting Arkansas’s children.²⁰⁷ Further, the Act violates Due Process because it “allows the same treatments for cisgender minors that are banned for transgender minors as long as the desired results conform with the stereotype of the minor’s biological sex.”²⁰⁸ For all the reasons stated above, among others, the “Defendants and successors in office are enjoined from enforcing any provision of [Arkansas Act 626].”²⁰⁹

In November of 2022, “[a] closely divided federal appeals court . . . declined to hear arguments over whether to revive [Act 626].”²¹⁰ Five of the eleven judges on the U.S. Court of Appeals for the Eighth Circuit joined in a dissent saying the case’s importance warranted a hearing by the entirety of the court after a three-judge panel of the court had already refused to revive the law in August.²¹¹

Finally, in June of 2023, Judge Moody issued a permanent injunction for Arkansas Act 626, officially deeming the nation’s first transgender care ban for adolescents unconstitutional.²¹² “Rather than protecting children or safeguarding medical ethics, the evidence showed that the prohibited medical care improves the mental health and well-being of patients and that, by prohibiting it, the State undermined the interests it claims to be advancing” the ruling reads.²¹³ “The testimony of well-credentialed experts, doctors who provide gender-affirming medical care in Arkansas, and families

205. *Id.* at 892.

206. *Id.*

207. *Id.* at 893.

208. *Brandt*, 551 F. Supp. 3d at 894.

209. *Id.*

210. Brendan Pierson, *Arkansas Loses Renewed Bid to Revive Ban on Gender-Affirming Care for Minors*, REUTERS (Nov. 16, 2022, 6:02 PM EST), <https://www.reuters.com/legal/government/arkansas-loses-renewed-bid-revive-ban-gender-affirming-care-minors-2022-11-16> [<https://perma.cc/3W6D-XZYA>].

211. *See id.*

212. *See Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 U.S. Dist. LEXIS 106517, at *113–14 (E.D. Ark. June 20, 2023).

213. *Id.* at *106.

that rely on that care directly refutes any claim by the State that the Act advances an interest in protecting children.”²¹⁴ Despite the injunction however, Judge Moody’s decision is likely to be appealed, leaving the future of Arkansas transgender care in the air.²¹⁵

VIII. WHAT DOES THIS MEAN FOR THE NATION AT LARGE?

A recent NPR analysis highlighted that over the past two years, state lawmakers introduced at least 306 bills that target trans persons, with eighty-six percent of this legislation focusing on trans youth.²¹⁶ Although not every proposal has succeeded, around fifteen percent of the bills have been signed into law, and statehouses across the country are becoming an increasingly hostile environment toward LGBTQ rights.²¹⁷

Katie Eyer, a professor at Rutgers Law School, suggests that this is an echo of the period after *Brown v. Board of Education*, a time when the U.S. Supreme Court banned segregation in schools, but many states continued attempts to pass laws obstructing the ruling.²¹⁸ Eyer states that this statewide phenomenon “can really stymie efforts for people to actually experience what the courts have said should be their constitutional rights.”²¹⁹

This phenomenon further fuels the fear of trans youth across the nation.²²⁰ A recent poll from the Trevor Project, an organization that “provides crisis support for the LGBTQ community, found that 85% of trans and nonbinary youth said their mental health was negatively affected by these laws.”²²¹ A later poll found that “more than half of trans and nonbinary youth ‘seriously considered’ suicide in the past year.”²²²

214. *Id.* at *107.

215. *See supra* note 21 and accompanying text.

216. Koko Nakajima & Connie Hanzhang Jin, *Bills Targeting Trans Youth Are Growing More Common—and Radically Reshaping Lives*, NPR (Nov. 28, 2022, 5:00 AM ET), <https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports> [<https://perma.cc/REJ2-MMN2>]; *see also* Renuka Rayasam, *The Transgender Care That States Are Banning, Explained*, POLITICO (Mar. 25, 2022, 07:00 PM EDT), <https://www.politico.com/newsletters/politico-nightly/2022/03/25/the-transgender-care-that-states-are-banning-explained-00020580> [<https://perma.cc/8SAB-KPH5>] (elaborating on the object of state bans); *Legislation Affecting LGBTQ Rights Across the Country*, ACLU (last updated Dec. 2, 2022), <https://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2022?redirect=legislation-affecting-lgbtq-rights-across-country> [<https://perma.cc/E23W-EPZV>] (list of legislation affecting LGBTQ rights across the country, updated monthly).

217. *See Nakajima & Jin, supra* note 216.

218. *See id.*; *see also* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

219. Nakajima & Jin, *supra* note 216.

220. *Id.*

221. *Id.*

222. *Id.*

Additionally, the Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health surveyed 34,000 LGBTQ youths aged thirteen to twenty-four across the United States.²²³ "Forty-eight percent of them identified as transgender or nonbinary."²²⁴ This survey also found that "93 percent of trans and non-binary teenagers and young people are worried about trans people being denied access to gender-affirming medical care due to state or local laws"²²⁵ Such statistics support the notion that although Arkansas Act 626 has been temporarily blocked by judicial efforts, the LGBTQ youth generally experience the negative impacts of the legislation, regardless of if these bills are in effect.²²⁶

Not only is the impact on the LGBTQ community deep, but it is wide and vast.²²⁷ New estimates based on CDC health surveys highlight "a stark generational shift in the growth of the transgender population of the United States."²²⁸ Relying on surveys conducted from 2017 to 2020, it is "estimated that 1.4 percent of 13- to 17-year-olds and 1.3 percent of 18- to 24-year-olds were transgender, compared with about 0.5 percent of all adults."²²⁹ This data was then analyzed by researchers at the University of California, Los Angeles Williams Institute, who found that "people [aged] 13 to 25 accounted for a disproportionately large share of the transgender population."²³⁰

Such an increase in the number of transgender adolescents only further highlights how pressing this crisis is across the nation. While it is positive progress to see that "young people increasingly have the language and social acceptance to explore their gender identities," this progress also accounts for the growing number of minors in the United States who are affected by sweeping anti-trans legislation.²³¹ The gravity of the current legal impacts is heavy, and the expansive national mental and physical health crisis is pressing.

223. Eesha Pendharkar, *Number of Trans Youth Is Twice as High as Previous Estimates, Study Finds*, EDUCATIONWEEK: EQUITY & DIVERSITY (June 14, 2022), <https://www.edweek.org/leadership/number-of-trans-youth-is-twice-as-high-as-previous-estimates-study-finds/2022/06> [<https://perma.cc/3434-9P5A>].

224. *Id.*

225. *Id.*

226. Nakajima & Jin, *supra* note 216.

227. See Azeen Ghorayshi, *Report Reveals Sharp Rise in Transgender Young People in the U.S.*, N.Y. TIMES (June 10, 2022), <https://www.nytimes.com/2022/06/10/science/transgender-teenagers-national-survey.html> [<https://perma.cc/W78M-3HND>]; see also Robin Respaut & Chad Terhune, *Putting Numbers on the Rise in Children Seeking Gender Care*, REUTERS (Oct. 6, 2022, 11:00 AM GMT), <https://www.reuters.com/investigates/special-report/usa-transyouth-data> [<https://perma.cc/BR8F-MNRZ>].

228. Ghorayshi, *supra* note 227.

229. *Id.*

230. *Id.*

231. See *id.*

CONCLUSION

Arkansas Act 626 is a Statute that carries immense gravity.²³² It is a Statute that is representative of an issue greater than itself—one that embodies the dignity we afford adolescents in the United States.²³³ *Brandt v. Rutledge* is en route to perhaps be a landmark decision.²³⁴ It will likely make its way to the Supreme Court of the United States and thus, set the precedent for how this Country chooses to respect and support the transgender community at large.²³⁵

Access to puberty blockers should not be controversial.²³⁶ Puberty blockers simply work to suppress the production of testosterone and estrogen, buying everyone time: more time for physicians to advise proper guidance and more time for parents and children to make an informed decision about the trajectory of the child's body.²³⁷ Puberty blockers are in fact recommended by WPATH SOC for the sheer reason that they are *completely reversible*.²³⁸ The harm of forcing a child with GID to undergo puberty far surpasses any dangers that access to puberty blockers could ever pose.²³⁹ The data reflects stark increases in violence, suicide, and substance abuse when we fail to afford our children the simple dignity of decision-making over their bodies.²⁴⁰

The challenges ahead for the legal protections for adolescent access to puberty blockers are vast. We first need to overcome the parental consent requirement, because following the common best interest of the standard child strips minors of the dignity and liberty to feel connected within their own bodies and identities.²⁴¹ Then, if carefully constructed judicial bypass laws cannot be implemented in Arkansas, lawmakers will need to turn to reasonable alternatives including the Adult-Relative Alternative and the Professional Alternative.²⁴² These two pathways help expand the options for support available to an adolescent in signing off on puberty blockers before

232. See Dawson et al., *supra* note 2.

233. See Conron, *supra* note 51.

234. See Pierson, *supra* note 210.

235. See *id.*

236. See *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670–71 (8th Cir. 2022).

237. See Vergani, *supra* note 23, at 908.

238. *Id.* at 908.

239. See *id.* at 924 (“[T]he consequences of denying minors the ability to begin puberty suppression treatments indicate that allowing children to undergo the treatments without parental consent is in their best interests.”).

240. *Id.*

241. See Ikuta, *supra* note 43, at 187.

242. See Ehrlich, *supra* note 106, at 176.

having to turn to possible sanctuary cities that hold accessibility complications.²⁴³

If state measures continue to fail, Arkansas may look to federal options such as Section 1557 of the ACA, Section 504 of the Rehabilitation Act, and Title II of the ADA.²⁴⁴ Further, the Biden administration could take action by having the Department of Justice step in and sue Arkansas, adding urgency and attention to the pressing issue at hand.²⁴⁵

Transgender lives of adolescents, and thus the transgender adult lives of the future, are on the line. How our nation chooses to face laws such as Arkansas Act 626 will set in stone the level of personhood that we choose to afford transgender persons. It will define how we conceptualize one's right to self-determination and liberty to exist in a body of their choosing. My continual hope is that the Nation will come down on the right side of history in this matter.

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243. *Id.* at 176–77.

244. *See infra* Part VI.

245. *See* Keith, *supra* note 176.

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