IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

DYLAN BRANDT, by and through his mother,
Joanna Brandt, et al.,

PLAINTIFFS,

v. No. 4:21-CV-00450-JM

LESLIE RUTLEDGE, in her official capacity as
the Arkansas Attorney General, et al.,

DEFENDANTS.

BRIEF IN SUPPORT OF MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Court Rules

Other Authorities

INTRODUCTION

The SAFE Act responds to widespread, growing international concerns about performing experimental, life-altering gender-transition procedures on children in the absence of evidence WKDW WKRVH SURFHGXUHV DFWXDOO\ OHDG WR EHWWHU KHDOWK RXWFRPHV involve invasive surgery, giving children puberty-blocking drugs and cross-sex hormones can have irreversible physical consequences—for instance, permanent infertility and destroying the ability of previously healthy sex organs to function. And as a result, courts and public health officials have considered whether children can ever truly consent to such permanent and life-altering procedures. Indeed, how can a child whose body has not yet developed these functions understand the impact on his or her adult life of never developing them?

This issue has arisen in judicial proceedings around the world. In December 2020, the U.K. High Court of Justice of England and Wales determined that children likely cannot ever understand the irreversible consequences of using puberty-blocking drugs as a gender-transition procedure. Thus, the High Court said, children usually cannot give informed consent to the experimental use of these drugs for gender transition. And in March 2021, the U.S. District Court for the District of Arizona confronted a similar question about the use of double mastectomies on children as a gender-WUDQVLWLRQ SURFHGXUH 5HO\LQJ RQ WKH +LJK court came to a similar conclusion regarding the experimental nature of such gender-reassignment surgeries.

Responding to these international developments, the Arkansas General Assembly enacted the Save Adolescents from Experimentation (SAFE) Act. Finding a lack of credible scientific evidence that gender-WUDQVLWLRQ SURFHGXUHV LPSURYH FKLOGUHQ tionally recognized concerns, the General Assembly determined that the irreversible, long-term

consequences of performing these procedures on Arkansas children were too great to allow practitioners to continue performing them. The SAFE Act therefore prohibited them. Yet reflecting WKH *HQHUDO $VVHPEO\¶V concern, the SAFE Act did not prohibit the use of counseling or therapy for children but only those procedures that alter children physiologically or anatomically. Nor did the SAFE Act prohibit the use of any procedure whatsoever on adults. Adults remain free to choose the covered gender-transition procedures.

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would require this Court to extend current precedent in unsupportable ways. Their claim under the Equal Protection Clause rests on the unfounded assumption that a prohibition on gender-transition procedures for minors is unconstitutional discrimination. But such a prohibition discriminates, if at all, QDWHV LI DW DOO RQO\ RQ WKH EDVLV RI D SHUVRQ¶V DJ Supreme Court has made clear that the Equal Protection Clause does not require heightened scrutiny for age-based distinctions.

3ODLQWLIIV¶ VXEVWDQWLYH-due-process claim fares no better. Children themselves have no substantive-due-process right to access the procedures covered by the SAFE Act and, as a corollary, neither do parents have a right to subject their children to those same procedures. Finally, Plain-

WLIIV¶ free-speech FODLP LJQRUHV 6XSUHPH &RXUW SUHFHGHQW

power to regulate the practice of medicine includes the power to limit the types of procedures for which practitioners may refer patients.

1RQH RI WKHVH GHILFLHQFLHV LQ 3ODLQWLIIV¶ FODLP

fore, as more fully explained below, this Court should dismiss the Complaint with prejudice.

BACKGROUND

/DVW 'HFHPEHU WKH $GPLQLVWUDWLYH &RXUW RI WKH of England and Wales issued its decision in *Bell v. Tavistock and Portman National Health Service Foundation Trust*, [2020] EWHC (Admin) 3274.[1] In that proceeding, the claimants sought judicial review of practices of the U.K. 1DWLRQDO +HDOWK 6HUYLFH¶V 7DYLVW YHORSPHQW 6HUYLFH ³WKH 7DYLVWRFN ,GHQWLW\´ In particular, its practice of prescribing puberty blocking drugs to children under 18 suffering from gender dysphoria. *Id.* ¶ 2. At the heart of the case was whether children ever are competent to consent to that experimental use of puberty blocking drugs. *Id.* ¶ 6. The High Court decided that children usually cannot give informed consent to puberty-blocking drugs. *See id.* ¶¶ 151-53.

The *Tavistock* decision made international headlines and focused attention on the scientifically unsupported, politically driven nature of the push for experimental gender-transition procedures for children suffering from gender dysphoria. *Tavistock* has also impacted court decisions in the United States. In March 2021, a federal court relied on that decision in denying a PRWLRQ WR HQMRLQ WKH $UL]RQD 0HGLFDLG SURJUDP¶V H -reassignment surgery. *Hennessy-Waller v. Snyder*, No. CV-20-00335-TUC-SHR, 2021 WL 1192842, at *1 (D. Ariz. Mar. 30, 2021). The court noted that the *Tavistock* ³GHFLVLRQ UHJDUGLQJ SXEHUW -suppressing medication being experimental suggests the irreversible surgery Plaintiffs seek here is also experimental.´ *Id.* at *5.

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Given the international attention received by the High Court's rulings in Tavistock—and its close proximity to the General Assembly's Act—a somewhat detailed summary of that decision helps put the SAFE Act in context.

A. The Tavistock decision explains why children usually cannot consent to irreversible experimentation using puberty-blocking drugs.

The Tavistock claimants were a young woman whom the Tavistock clinic had put on a regimen of puberty blockers and testosterone and who eventually underwent a double mastectomy, id. ¶¶78-83,

The High Court examined other evidence undermining the claim that the effects of puberty blockers are fully reversible. *Cf.* Compl. ¶ 38 (alleging otherwise). Puberty blockers ³VWRS the physical changes in the body when going through puberty.´ *Tavistock*, [2020] EWHC 3274, ¶ 64. And because ³\RXQJ SHRSOH PDWXUH WKURXJK DGROHVFHQFH experiences . . . that maturing process is stopped or delayed´ IRU \RXQJ SHRSOH RQ SXE blockers² ³with potential social and psychological impact which could be described as non-YHUVLEOH´ 7KH ³FHQWUDO SRLQW´ RI WKH FODLPDQWV¶ practices was that, although some of the physical consequences of puberty blockers may be reversible if they are stopped, ³the child or young person will have missed a period, however long, of normal biological, psychological and social experience through adolescence; and that missed development and experience, during adolescence, FDQ QHYHU WUXO\ EH reversed´ ³UHFRYHUHG *Id.* ¶ 65; *see id.* ¶ ³>7@KH XVH RI SXEHUW\ EORFNHUV LV QRW LW WLPH VWDQGV VWLOO IRU WKH FKLOG RQ SXEHUW\ EORFNH

Indeed, particularly relevant here, the High Court noted that in June 2020 the National +HDOWK 6HUYLFH UHPRYHG IURP LWV ZHEVLWH D VWDWHPHQ and replaced it with a disclaimer that is far more tentative:

> Little is known about the long-term side effects of hormone or puberty blockers in children with gender dysphoria.
>
> Although the Gender Identity Development Service (GIDS) advises [that] this is a physically reversible treatment if stopped, it is not known what the psychological effects may be.
>
> , W¶V DOVR QRW NQRZQ ZKHWKHU KRUPRQH affect the development of the EORFNHUV WHHQDJH EUDLQ RU FKLOGUHQ¶V ERQHV Side effects may also include hot flushes, fatigue and mood alterations.

Id. ¶ 67 (emphases in *Tavistock*); *see id.* ¶ 66.

Moving to consider the practice of following puberty blockers with crosssex hormones, the High Court recognized that ³crosssex hormones are to a very significant degree not reversible. . . . [A] very high proportion of those who start puberty blockers move on to crosssex hormones and thus in statistical terms once a child or young person starts on puberty blockers, they are on a very clear clinical pathway to crosssex hormones.´ Id. ¶ 68; see id. ¶ 136 (describing puberty blockers and cross-V H [K R U P R Q H V D V ³W Z R V W D J H V R I R Q H F O L Q S D W K Z D \ L W L V H [W U H P H O \ U D U H I R U ... id. ¶ ³>7@KH FOLQLFDO DVVRFLDWLRQ EH- tween the use of puberty blockers and cross-sex hormones supports the case that it is appropriate to view puberty blockers as a stepping stone to cross-V H [K R U P R Q H V ´

Given the long-term effects of placing minors on puberty blockers and, mostly likely, eventually cross-sex hormones, the High Court credited evidence F H W K D W ³F K L O G U H Q R I W not understand the implications of matters such as the loss of the ability to orgasm, the potential need to construct a neo-Y D J L Q D R U W K H ... Id. ¶ 93. It also placed importance on the fact that the FDA has not approved puberty blockers for treating gender dysphoria. See id. ¶ 70 (³,Q WKH 86$ WKH WUHDWPHQW RI JHQGHU G\VSKRULD LV Q EORFNHUV FDQ -RQDWKDQ)HUUXFFL WHVWLILHG ³WKH ODFN RI D ILUP HYLGHQF HYLGHQW IURP WKH YHU\ OLPLWHG SXEOLVKHG PDWHULDO Id. ¶ $QG ZRUVW RI DOO ³WKH WUHDWPHQW ... gender dysphoria EH VXSSRU circumstances in which it is at least possible that without that treatment, the gender dysphoria ZRXOG UHVROYH LWVHOI ´ Id. ¶ 77.

Throughout the decision, the High Court reached a number of sobering conclusions concerning the use of puberty-blocking drugs as a treatment for gender dysphoria.)LQGLQJ ³UHDO X certainty over the short and long-term consequences of the treatment with very limited evidence

DV WR LWV HIILFDF\ ´ WKH +LJK &RXUW described as experimental-WKDW

PHQW id. ¶´ 7KH WUHDWPHQW ³KDV GLUHFW SK\VLFDO FRQVH

FRQGLWLRQ ³JHQGHU G\SKRULD KDV¶ 35. and the High Ct SK\VLFD

Court concluded that children cannot appreciate the physical consequences of that treatment. See

id. ¶

course of puberty in a child are mostly unknown, given the lack of longitudinal studies evaluating the risks and benefits [illegible] Psychological Distress [illegible], sec. 2(6). (Contrast this off-label use of puberty blockers with the well-studied use of them to delay puberty in children for whom early puberty is medically inappropriate.) In other words, practitioners do not know the long-term consequences of blocking normal testosterone levels in a boy going through puberty, or estrogen in a girls. Yet they are placing boys and girls on puberty blockers anyways. See id.

Prescribing cross-sex hormones (i.e., testosterone for biological females and estrogen for biological males) likewise lacks a sound clinical basis and poses serious risks. Id., sec. 2(7). These risks are well-known. For biological females, they include erythrocytosis (an increase in red blood cells), severe liver dysfunction, coronary artery disease (including heart attacks), cerebrovascular disease (including strokes), hypertension, breast and uterine cancer, and irreversible infertility. Id., sec. 2(8)(A). For biological males, cross-sex hormones are known to cause thromboembolic diseases (including blood clots), cholelithiasis (including gallstones), coronary artery disease (including heart attacks), macroprolactinoma (a tumor of the pituitary gland), cerebrovascular disease (including strokes), elevated blood triglycerides, breast cancer, and irreversible infertility. Id., sec. 2(8)(B).

Referrals of children for experimental gender-reassignment surgeries are increasing. Id., sec. 2(9), 13(B). These complex, invasive surgeries routinely involve the alteration or destruction of biological functions and frequently require subsequent lifelong attention. Id., sec. 2(10)-(12). For biological males, surgeries may involve mammoplasty, thyroid cartilage reduction [illegible] removal of the penis or testicles, gluteal augmentation, and construction

of an artificial vagina, clitoris, or vulva.

SXUSRVH RI DVVLVWLQJ DQ LQGLYLGXDO ZLWK D JHQGHU W Id., sec. 3 (enacting Ark. Code Ann. 20-9-1501(6)(A)).

Crucially, the SAFE Act does not prohibit gender-transition procedures for anyone 18 years old or above. Id. (enacting Ark. Code Ann. 20-9-1502(a)). The law also does not prohibit services to children who suffer from:

- a disorder of sex development (including children with irresolvably ambiguous external sex characteristics, abnormal chromosome structure, sex steroid hormone production, or sex steroid hormone action);
- a disorder arising from previous gender-transition procedures; or
- a physical disorder that would place a child in imminent danger of death or impairment of a major bodily function.

Id. (enacting Ark. Code Ann. 20-9-1502(c)). Finally, the SAFE Act does not prohibit—rather, it encourages[2] the provision of mental health services to children to address the comorbidities and underlying causes of their distress. Id., sec. 2(4).

Plaintiffs filed suit on May 25, 2021, asking the Court to stop Arkansas from protecting distressed and vulnerable children from being subjected to these experimental procedures, which have irreversible and long-term consequences, including the destruction of functional sex organs, or the prevention of functional sex organs from ever developing[3]—procedures for which the benefits have not been established. Determining that these known risks outweigh the unknown benefits, Arkansas has made the decision that doctors in this State cannot, consistent with established principles of medical ethics, continue performing these procedures on children.

Legal Standard

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Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Each of their claims does not meet this standard unless W K H \ K D Y H ³ S O H D G > H G @ I D F W X D O F R Q W H Q W L R Q D E O H L Q I H U H Q F H W K D W W K H G H I H Q G D Q W L V O L D E O H I R U W K H P L V F R Q G X F W & R X U W W R ³ D F F H S W D V W U X H D O O W K H I D F W X D O F O D L P V ´ Williams v. City of Sherwood, Ark., No. 4:18-CV-00097, 2018 WL 9708622, at *1 (E.D. Ark. Aug. 17, 2018). Even though this analysis requires that D need not ³ D F F H S W O H J D O F R Q F O X V L R Q V ´ couched as a factual allegation, Iqbal, 556 U.S. at 678 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)) (quotation marks omitted).

ARGUMENT

I. Plaintiffs lack standing.

A. All Plaintiffs lack standing to challenge the gender-reassignment-surgery ban, the private-right-of-action provision, and its private right of action.

No Plaintiff has standing to challenge two provisions in the SAFE Act: one, prohibiting gender-reassignment surgery on minors; the other, creating a private right of action.

1. Plaintiffs do not allege that the practitioners perform gender-reassignment surgery[2] to say nothing of gender-transition surgery on children. *See* Compl. ¶¶ 13, 14; *see also* SAFE Act, sec. 3 (enacting Ark. Code Ann. 20-9- G H I L Q L Q J ³ * H Q L W D O J H Q G H U J H U \ ´ D Q G ³ 1 R Q J H Q L W D O J H Q L W D O P X W L O D W L R Q ´ Further, Plaintiffs do not allege that any of the children seek gender-reassignment surgery or even that they will do so while they remain children. For one thing, Plaintiffs acknowledge that even WPATH does not recommend genital gender-reassignment surgery for children. *See* Compl. ¶ 45. By contrast, WPATH would allow girls under the age of 18 to undergo certain nongenital gender-reassignment surgeries, including double mastectomies. *See id.* But Plaintiffs do not allege that any of the children currently seek either genital B

Therefore, they have not met their burden to establish standing to challenge the SAFE Act as it applies to gender-reassignment surgery. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) Plaintiffs must allege facts sufficient to establish standing for each claim they bring and for each form of relief they seek. Webb as next friend of K. S. v. Smith, 936 F.3d 808, 814 (8th Cir. 2019) Taking the allegations in the Complaint as true, they have pleaded no facts sufficient to show that the SAFE Act is preventing them from undergoing or performing gender-reassignment surgery. As a result, W K H \ O D F N V W D Q G L Q J W R F K D O O H Q J H W gender-reassignment surgery, and that portion of the Complaint should be dismissed.

2. Plaintiffs D O V R O D F N V W D Q G L Q J W R E U L Q J F K D O O H Q J H V W K H 6 $) (SAFE Act, sec. 3 (enacting Ark. Code Ann. 20-9-1504(b) through (c), which creates a private right of action). Any injury caused by the private right of action is Q R W 3 I D L U O \ W U D F H D B fendants, who are exclusively state officials sued in their official capacities. See Compl. ¶¶ 15-17 (naming state officials). In fact, it is difficult to conceive of how the private right of action could ever injure the children and parents who are Plaintiffs. None of them could ever be de- I H Q G D Q W V L Q D O D Z V X L W E U R X J K W D F F R U G L Q J W R W K H 6 $) any injury would not be redressable by an order from this Court.

Courts have rejected similar challenges to private rights of action in State courts. Just this month, the Northern District of Texas dismissed such a challenge against a Texas law providing a private right of action for lack of jurisdiction. See Planned Parenthood of Greater Tex. Surgical Health Servs. v. City of Lubbock, Tex., F. Supp. 3d , No. 5:21-CV-114-H, 2021 WL 2385110, at *1 (N.D. Tex. June 1, 2021). Because plaintiffs fail to show that any relief provided by this Court is likely to redress the injury at issue in citizen suits brought in state court, the Court lacks jurisdiction. And both the Fifth and Seventh Circuits have issued en

banc decisions explaining the rationale for such a holding. See Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) ³ >laintiffs lack standing to contest the statutes authorizing private rights of action, not only because the defendants cannot cause the plaintiffs injury by enforcing the private action statutes, but also because any potential dispute plaintiffs have may with future private plaintiffs could not be redressed by an injunction running only against public S U R V H I, X k a R d i v. F o s t e r, 244 F.3d 405, 427 (5th Cir. 2001) (en banc) (holding that V W D W H R I I L F L D O V L Q W K H L U R I I L F L D O F D S D F L W \ ³ F D Q Q R W S U R V H F X W L Q J D F D X V H R I D F W L R Q ´

Defendants here cannot bring a private right of action against a practitioner, Defendants otherwise have authority to enforce those provisions. Therefore, the Court should hold that Plaintiffs lack standing to challenge W K H O D Z ¶ V private action. D W H U L J K W

access to gender-transition procedures,[3] > E @ H I R U H S X E H U W \ J H Q G H U W U D Q V L

S K D U P D F H X W L F D O R U M X U J L F D O L Q W H U Y H Q W L R Q ´

i. %HIRUH GHWDLOLQJ WKRVH EURDGH-U SUREOHPV ZLWK

ii. To be clear, under established this SD U W \ V W D Q G L Q J G R F W U L Q H W K H party claims should not be allowed to proceed. First, the practitioners cannot allege a close relationship with their patients for they have a conflict of interest with those patients. MTJ -12(a)4sir VTJ -1S4

of hypothetical future clients. 543 U.S. at 134. In reaching that conclusion, the Court discussed a long line of authorities and observed that third-party standing has been approved only when the litigant asserts the rights of known claimants. Id. at 131, 134. Third-party standing is not appropriate when the litigant purports to assert the rights of hypothetical future claimants because ³WKHUH LV ³QR UHODWLRQVKLS DW DOO´ EHWZHHQ WKH P ³QR UHODWLRQVKLS DW DOO´ ZLWK WKHVH K\SRWKHWLFDO See id.

This point raises the second reason the practitioners cannot assert third party standing. Even if the practitioners could identify known patients on whose behalf they wish to sue, such patients would face no ³KLQGUDQFH´ from protecting their own interests in their own lawsuit. Kowalski, 543 U.S. at 130. Eleven of the named Plaintiffs are children and their parents. See Compl. ¶¶ 9-12. Two are children undergoing gender transition procedures. Id. at 72, 79. And at least

to fix the terms R I D G P L V V L R Q´ Barsky v. Bd. of Regents of Univ., 347 U.S. 442, 451 (1954); Birchansky v. Clabaugh, 955 F.3d 751, 755 (8th Cir. 2020) (rejecting a claim that medical providers K D Y H ³right to provide approved medical services´ $ Q \ V X F K would necessarily be ³derivative from,´ and therefore duplicative of, those patients. Whalen v. Roe, 429 U.S. 589, 604 (1977) (holding that G R F W R U V ¶ was ³ Q R W D V W U R Q J H U ´ W K D Q ... > S D W L H Q W V ¶ @ disposed of ... W K H U H I R U H ... D V Z H O O ´ 7 K H U H I R ... P L V V W K H S U D F W L W L R Q H U V ¶ third-party equal-protection claim I L U V W

II. Plaintiffs fail to state an equal-protection claim.

A. The SAFE Act is subject to only rational-basis review.

Under the Equal Protection Clause, absent special circumstances, W K H 6 $) ($ F W ³ L V D F ... F R U G H G D V W U R Q J S U H V X P S W L R Q Heller v. Doe, 509 U.S. 312, 319 (1993). In that case, it is constitut L R Q D O ³ V R O R Q J D V L W E H D U V D U D W L R Q D O Vacco v. Quill, 521 U.S. 793, 799 (1997). ³ > , @ I D Q \ V W D W H R I I D F W V U H D V R Q D E O \ P D ... SAFE Act, then it is constitutional. McGowan v. Maryland, 366 U.S. 420, 426 (1961). The only H [F H S W L R Q L V I R U O D Z V W K D W ³ L Q Y R O Y > H @ I X Q G D P H Q W D O ... Heller, 509 U.S. at 319. Because the SAFE Act does neither of those things, only rational-basis review applies.

As an initial matter, Plaintiffs do not even allege that the SAFE Act involves fundamental rights of the children seeking to undergo gender-transition procedures, or the practitioners seeking to perform them. See Compl. ¶¶155-71. That is likely because, as explained below, there is no fundamental right for a practitioner to perform, or for a child to undergo, a gender-transition procedure. Cf. Planned Parenthood of Mid-Missouri & E. Kansas, Inc. v. Dempsey, 167 F.3d 458, 464 (8th Cir. 1999) (abortion clinics have no fundamental right to perform abortions). In any case, the practitioners could not use any right of a child as a means to elevate the standard of

any adult free to undergo the experimental procedures that it prohibits for children. This fact un-

GHUPLQHV 3ODLQWLIIV¶ FODLP WKDW WKH 6$)($FW FODVVL

See Compl. ¶¶ 165-66. Under the Act, a practitioner cannot perform a gender-transition proce-

dure on a young woman one month *before* her 18th birthday. But that same practitioner can per-

form that same gender-transition procedure on that same young woman one month *after* her 18th

birthday. Such a ³FODVVLILFDWLRQ E\ DJH GRHV QRW GHILQH D µGL

µH[WUDRUGLQDU\ SURWHFWLRQ IURP WKH PDMRULWDULDQ SROLWLFDO S *Stiles v. Blunt*, 912 F.2d 260,

264 (8th Cir. 1990) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314, 314 (1976)); *see*

United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

Plaintiffs attempt to avoid that conclusion by claiming the SAFE Act creates a classification based on transgender status since that Act only prohibits procedures that children who identify as transgender are likely to pursue. *See* Compl. ¶¶ 163, 164. But the Supreme Court has rejected precisely this sort of argument in the equal-protection context. *See, e.g.*, *Pers. $GP¶U of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979) (UHFRJQL]LQJ that many laws affect certain groups unevenly, even though the law itself treats them no differently from all other members of the FODVV GHV FehBle 0 0 1 255 [<00550 9

271 (1993) (quoting *Geduldig*, 417 U.S. at 496 n.20). Similarly, here, even if only children suffering gender dysphoria sought procedures the SAFE Act prohibits, it does not follow that the law classifies based on transgender status.

Attempting to manufacture a suspect classification, Plaintiffs conflate distinctions between different classes of children. Essentially, by conflating the category of children who identify as transgender with the distinct category of children seeking gender-transition procedures, Plaintiffs ask this Court to treat the latter as a proxy for the former. But the transgender community is not a monolith in which every person wants to take steps necessary to live in accord with their preferred gender. *See, e.g.*, *Doe 2 v. Shanahan*, 917 F.3d 694, 722 (D.C. Cir. 2019) (Williams, J., concurring in the result); *see id.* at 701 (Wilkins, J., concurring) (noting that "the transgender classification" includes "individuals who identify with the other gender but w

the same class. Many children with gender dysphoria and even many who identify as transgender have no desire to go through the

Further, PODLQWLIIV¶ UHSHDWHG UHIHUHQFHV WR JHQGHU-WUDQVLWLRQ SURFHGXUHV DV

QHFHVVDU\´ LV D OHJDO FRQFOXVLRQ. *Iqbal*, 556 U.S. at 678. The Court QHHG QRW ³DFFHSW DV WUXH D OHJDO FRQFOXVLRQ FRXFKHG DV D IDFWXDO DOOHJDWLRQ.´ *See Kosilek v. Spencer*, 774 F.3d 63, 89 (1st Cir. 2014) (en banc) (rejecting the claim that gender-transition surgery is medically necessary); *Gibson v. Collier*, 920 F.3d 212, 216 (5th Cir. 2019) (³>7@KH QHFHVsity and efficacy of sex reassignment surgery is a matter of significant disagreement within the PHGLFDO FRPPXQLW\. *Cf. City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 456 (1992) (2¶&RQQRU, J., GLVVHQWLQJ) (accepted medical practice ³is not in need of revision´ every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure´).

In the leading decision on gender-transition procedures for minors, the District of Arizona rejected the sort of analysis for which Plaintiffs advocate here. *See Hennessy-Waller v. Snyder*, No. CV-20-00335, 2021 WL 1192842 (D. Ariz. Mar. 30, 2021). The plaintiffs there were 15-

2. Even if the SAFE Act classified based on transgender status, rational-basis review would apply.

Even if the SAFE Act did classify based on transgender status, that is not a classification subject to heightened scrutiny. Neither the Supreme Court nor the Eighth Circuit has treated transgender status as a suspect classification under the Equal Protection Clause. And there is no warrant for extending current precedent to impose heightened scrutiny here.

As these allegations show, even taken at face value, Plaintiffs cannot maintain that there is a class of transgender children who [illegible] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985). Therefore, they cannot plausibly maintain the [illegible] characteristic determined solely [illegible] by the asserted [illegible] Gallagher, 699 F.3d at 1018. They have not pleaded allegations sufficient to create a new suspect classification. See Cleburne Living Ctr., 473 U.S. at 442 (withholding protected status

practitioners from inflicting harm. Given the limited nature of this prohibition, the SAFE Act VXEVWDQWLDOO\ IXUWKHUV $UNDQVDV¶V LPSRUWDQW REMH claim under the Equal Protection Clause, and this Court should dismiss.

C. The SAFE Act is not motivated by disapproval of transgender people.

Plaintiffs finally resort to alleging that the SAFE Act KDV ³QRWKLQJ WR GR ZLWK FKLOGUHQ DQG HYHU\WKLQJ WR GR ZLWK H[Compl. ¶ 64. They suggest that an improper legislative intent can be inferred from the fact that the General $VVHPEO\ FRQVLGHUHG YDULRXV Rexpressed their personal beliefs WKDW LQ RSSRVLWLRQ WR transition procedure GLIIHUHG IURP Id. WKH $FW¶V 55. But the Supreme Court has specifically rejected reliance on matters like this to discern legislative intent.

In Hunter v. Underwood, 471 U.S. 222 (1985), the Court explained that, because inquirLHV LQWR OHJLVODWLYH PRWLYHV RU SXUSRVHV DUH ³KD]D LV DVNLQJ LW WR LQWHUSUHW WKH is simply the interpretation RU WR Y RI OHJLVODWLRQ´ LW H[SODLQHG ³WKH &RXUW ZLOO ORRN the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risN WKH SRVVLELOLW\ RI PLV Id. at 228 (quoting &RQJUHVV United States v. O'Brien, 391 U.S. 367, 383-83 %XW ³>L@W LV HQWLUHO\ when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, RQ WKH EDVLV RI ZKDW IHZHU WKDQ D Id. That is because &RQJUHV ³>Z@KDW PRWLYDWHV RQH OHJLVODWRU WR illy what moti D VSHHF

F.3d at 864—namely, the purported right to subject their children to experimental gender-transition procedures. %HFDXVH VXFK D ULJKW LV QRW ³GHHSO\ URRWHG WLRQ ´ QRU ³LPSOLFLW LQ WKH FRQFHSW RI RUGHUHG OLEH due-process claim. Glucksberg, 521 U.S. at 720-21 (quotation marks omitted).

7KH SDUHQWV¶ IDLOXUH WR VWDWH WKLV FODLP FDQ E dren would have no substantive-due-process right of access to experimental gender-transition procedures, a fortiori, the parents cannot themselves have a right to access those same proce- GXUHV RQ EHKDOI RI WKHLU FKLOGUHQ DQG does not extend WKH clude a right to choose a particular experimental medical procedure for that child.

A. There is no right of affirmative access to experimental gender-transition procedures.

The parents assert a novel fundamental right to access experimental gender-transition procedures for their children. See Compl. ¶ 175. But such a right could exist RQ WKH SDUHQWV¶ only if a child herself has a substantive due-process right to experimental gender-transition procedures for him or herself. 7KH SDUHQWV¶ parental-rights claim is thus "derivative from, and there- IRUH QR VWURQJHU WKDQ WKH SDWLHQWV¶ FODLP DQG WKH GRFWRU¶V FODLP LV GHU claim. Whalen, 429 U.S. at 604.

Plaintiffs do not allege that there is an individual right of affirmative access to experimental gender-transition procedures, and for good reason: there is no such right. "The mere novelty of such a claim is reason enough to doubt that substantive due process sustains it; the alleged right certainly cannot be considered so rooted in the traditions and conscience of our people as WR EH UDQNHG DV IXQGDPHQWDO Reno v. Flores, 507 U.S. 292, 303 (1993) (quotation and citation omitted).

Federal courts of appeal have spoken with one voice in rejecting such affirmative-access claims. Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 710 n.18 (D.C. Cir. 2007).

But t

- Buy herbal snuff (Ark. Code Ann. §20-27-2403(a));
- Use a wireless telecommunications device or a hands-free wireless telephone while driving (Ark. Code Ann. §27-51-1603);
- Rent a personal watercraft (Ark. Code Ann. §27-101-604(e));
- Bet on horse races (Ark. Code Ann. §23-110-405(c));
- Bet on dog races (Ark. Code Ann. §23-111-308(a), §23-111-508(c));
- Play a game of bingo or purchase a raffle tickets (Ark. Code Ann. §23-114-404(b));
- Buy a lo54.16 o 1 0 0 1 495.94 561.1 Tm 140 0 1 4rk. CodeMCID 31>.ts (Ark. Code Ann. 23

and open-ended,´ and "[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action.´ Glucksberg, 521 U.S. at 720 (quoting Collins v. City of Harker Heights, Tex., 503 U.S. 115, 125 (1992)). A parental right to approve experimental gender-transition procedures on their children is not "GHHSO\ URRWHG LQ WKLV 1DWLRQ¶V WUDGLWLRQ >DQG@ extinguished by its absence. Id. at 721. Therefore, Plaintiffs fail to state a substantive due-process parental rights claim, and the Court should dismiss the Complaint.

IV. Plaintiffs fail to state a free-speech claim.

The SAFE Act creates a new section in the Arkansas Code HQWLWOHG "3URKLELWL WUDQVLWLRQ SURFHGXUHV RQ &KLOGUHQ $FW´ (SAFE Act, sec. 3 (creating Ark. Code Ann. 20-9-1502). Subsection (a) provides that a practitioner "VKDOO Q Id. (b) provides that a practitioner "VKDOO Q VLRQDO IRU JHQGHU WUDQVLWLRQ SURFHGXUHV ´

Plaintiffs claim that subsection (b) violates the First Amendment rights of practitioners, as well as children and parents, by preventing practitioners from speaking about gender-transition procedures. But the law does nothing of the sort. Rather, having prohibited experimental gender-transition procedures on children, the law likewise prohibits practitioners from sending children to another practitioner for the procedures. This is plainly not a regulation of speech but of professional conduct. It prohibits not the expression of ideas about the procedures but the re[((of3<0m

CONCLUSION

In light RI WKH QXPHURXV IDWDO GHILFLHQFLHV RI 3ODLQW

request that the Court dismiss the Complaint with prejudice

Dated: June 16, 2021

Respectfully submitted,

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