UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

VICTOR VOE, by and through his parents and next friends, Vanessa Voe and Vance Voe; *et al.*,

Plaintiffs,

v.

THOMAS MANSFIELD, in his official capacity as Chief Executive Officer of the North Carolina Medical Board; *et al.*,

Defendants,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenor-Defendants.

CASE NO. 1:23-cv-864

INTERVENOR-DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

On June 29, the North Carolina General Assembly passed S.L. 2023-111 (H.B. 808), *codified at* N.C. Gen. Stat. §§90-21.150-.154 and N.C. Gen. Stat. §143C-6-5.6, a law that protects North Carolina minors from experimental gender transition procedures. Almost two months later, on August 16, H.B. 808 became immediately effective after the General Assembly, with a bipartisan vote in the House, overrode Governor Cooper's veto. S.L. 2023-111 §5. Despite this advance notice and the law's immediate effectiveness, Plaintiffs waited nearly two months to sue.

In the meanwhile, both the Sixth and Eleventh Circuits reversed or vacated preliminary injunctions prohibiting enforcement of virtually identical prohibitions in Tennessee, Kentucky, and Alabama laws. *L.W. v. Skrmetti*, 83 F.4th 460, 491 (6th Cir. 2023), *cert. filed* (Nov. 1, 2023); *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205, 1210-11 (11th Cir. 2023). And the Eighth Circuit granted initial en banc review of a permanent injunction for a similar Arkansas prohibition. *Brandt v. Rutledge*, No. 23-2681 (8th Cir. Oct. 6, 2023) (en banc).

Yet Plaintiffs mention none of those developments because they want to rush this Court into granting an overbroad statewide preliminary injunction. A preliminary injunction is premature and unnecessary. Minor Plaintiff, the only individual whose treatment Plaintiffs identify as potentially impacted, (1) is not receiving and has not received any prohibited gender transition procedure; (2) is ineligible for *any* gender transition procedure until puberty; and (3) is incapable of providing informed consent for at least two to three years. No healthcare provider in North Carolina has expressed

willingness to provide such treatment to Minor while the private cause of action remains in place. And any minor with a "course of treatment that commenced prior to August 1, 2023" may keep obtaining that treatment. N.C. Gen. Stat. §90-21.152(b).

Similarly troubling, Provider Plaintiff (1) lacks third-party standing to assert the claims of patients; (2) fails to identify any patient denied treatment, or Medicaid coverage thereof, due to the challenged provisions in the law; and (3) cannot represent that Provider's employer would allow such treatment even if a preliminary injunction issues. Plaintiffs, therefore, are asking this Court to conflict with the Sixth and Eleventh Circuits by issuing a statewide preliminary injunction when no Plaintiff has even carried the burden of establishing standing.

This Court should deny the motion or, alternatively, limit the requested preliminary injunction's scope.

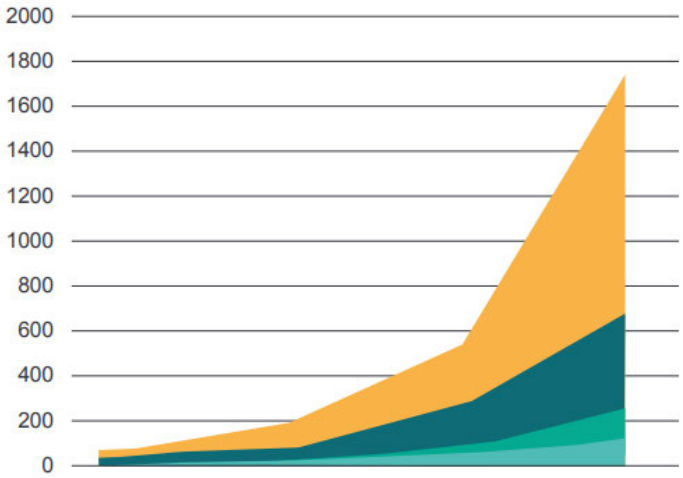
STATEMENT OF FACTS

I. Demand for Gender Transition Procedures Has Grown Exponentially.

There are two human sexes—male and female. Cantor Decl. ¶¶106-08 (Exhibit 1). Distinct from sex, an individual's "gender identity" is his or her personal sense of being male, female, or something else. *See id*. Gender dysphoria is a psychiatric diagnosis defined by diagnostic criteria set out in the *Diagnostic and Statistical Manual of Mental Disorders* 5-TR ("DSM-5"). *Id.* ¶109. In the last decade, the number of minors diagnosed with gender dysphoria or who have sought gender transition procedures exploded. *Id.* ¶64. This explosion disproportionately affects biological girls, such as Minor Plaintiff. *Id.* ¶136. The

following chart displays the number of minors, distinguished by sex, referred to the UK's Gender Identity Services clinic between 2009 and 2016:

Figure 1: Sex ratio in children and adolescents referred to GIDS in the UK (2009-16)



	2009	2010	2011	2012	2013	2014	2015	2016
Adolescents F	15	48*	78*	141*	221*	314*	689*	1071*
Adolescents M	24	44*	41	77*	120*	185*	293*	426*
Children F	2	7	12	17	22	36	77*	138*
Children M	10	19	29	30	31	55*	103*	131

AFAB = assigned female at birth; AMAB = assigned male at birth

***Indicates** p<.05 which shows a significant increase of referrals compared to the previous year

Source: de Graaf NM, Giovanardi G, Zitz C, Carmichael P (2018).[32]

The Cass Review, *Independent Review of Gender Identity Services for Children and Young People: Interim Report* 33 (Feb. 2022), http://tinyurl.com/5s56653n.

This phenomenon is "unexplained," Cantor Decl. ¶¶64-65, with some researchers positing that "social contagion" or peer influence may be a factor in the increase of cases, *see id.* ¶136. Others note the correlation with social media. *Id.* ¶¶29, 136.

II. "Transitioning" Minors Inflicts Irreversible Harms and Unknown Risk.

Psychotherapy is an accepted approach to treating gender dysphoria. *Id.* ¶16.

Advocates of so-called "gender-affirming care," however, also endorse medically "transitioning" minors. These interventions cause known harms and carry unknown risks.

The purported protocol for gender transition calls for suppressing an adolescent's natural puberty. Under the guidelines from the World Professional Association for Transgender Health (WPATH) and the Endocrine Society, providers prescribe GnRH agonists (puberty blockers) to suppress natural puberty. PI Memo., Doc. 14-1 at 4. Next, providers prescribe cross-sex hormones. *See id.* at 5. This means that biological females take testosterone, and biological males take estrogen. *Id.*

Taking cross-sex hormones without first going through puberty will sterilize a person. Cantor Decl. ¶205. For those who begin treatment later in puberty, "no studies at all have been done" regarding "when, … or with what probability either males or females can achieve healthy fertility if they later regret their transition" and cease treatment. *Id.* ¶206. And the hormonal and surgical treatment pathway *will* sterilize a person. *Id.* ¶205. For minors who take cross-sex hormones without going through puberty, "no viable fertility preservation options exist." *Id.*

In addition, when biological females undergo so-called "chest reconstruction surgery before the age of 18," Adkins Decl., Doc. 14-2 ¶26, "it is functionally irreversible" and "breast-feeding a child will never be possible." Cantor Decl. ¶207. Gender transition causes further harms including "increased cardiovascular risk, osteoporosis, and hormone dependent cancers." *Id.* ¶223 (quotations omitted).

"To date, there has been very limited research on the short-, medium- or longer-term impact of puberty blockers on neurocognitive development." *Id.* ¶209 (quotations

omitted). Many "have expressed concern that blocking the process of puberty during its natural time could have a negative and potentially permanent impact on brain development." *Id.* ¶212.

III. No Reliable Scientific Evidence Justifies Gender Transition for Minors.

A medical intervention is justified only when probable benefits outweigh probable risks. *Id.* ¶¶71-72. Given the significant irreversible risks, gender transition of minors cannot be justified unless there is a high degree of certainty regarding benefits. *Id.* ¶¶70-71, 205-06.

Several European countries have concluded that the demonstrated benefits do not clearly outweigh the risks. *Id.* ¶¶16-28. Every systematic review of medically and surgically transitioning minors has indicated "that there is insufficient evidence" to justify it. *Id.* ¶¶73, 75, 82. No systematic review has ever demonstrated these treatments reduce suicide deaths. *Id*. ¶147. Many gender-dysphoric minors, including a majority of prepubescent children like Minor Plaintiff, desist if gender transition procedures are not performed. *Id.* ¶116.

With the rise of minors diagnosed with gender dysphoria has come the rise of "detransitioners"—those who previously underwent some form of "gender-affirming" treatment but later come to identify with their sex. *Id.* ¶29. Their existence has been part of the basis for caution throughout the world. *Id.*

IV. Procedural History.

Plaintiffs allege that H.B. 808 violates the Fourteenth Amendment and Affordable Care Act. Compl., Doc. 1 ¶¶159-96. Plaintiffs requested a preliminary injunction enjoining

Defendants "from enforcing Sections 1 and 3 of the statute," PI Mot., Doc. 14 at 3, despite the inconsistent proposed order they filed yesterday asking to completely enjoin the law, Proposed Order, Doc. 34 at 1-2. Section 1 prohibits medical providers from providing gender transition procedures to minors, with certain exceptions, unless the course of treatment began before August 1. S.L. 2023-111 §1, *codified at* N.C. Gen. Stat. §§90-21.150-.153. Gender transition procedures include surgical gender transition procedures and providing puberty-blocking drugs or cross-sex hormones. N.C. Gen. Stat. §90-21.151. Section 3 of the statute limits the use of State funds for gender transition procedures for minors. S.L. 2023-111 §3, *codified at* N.C. Gen. Stat. §143C-6-6.5. Plaintiffs' requested injunction would leave medical professionals and their employers subject to Section 2's private cause of action. S.L. 2023-111 §2, *codified at* N.C. Gen. Stat. §90-21.154.

Minor Plaintiff is a 9-year-old biological girl diagnosed with gender dysphoria sometime since May 2021. Voe Decl., Doc. 14-9 ¶¶2, 5-11. In March 2023, providers at Duke Child and Adolescent Gender Care Clinic allegedly evaluated Minor and determined that Minor had not begun puberty and is not ready to start receiving puberty blockers to gender transition. *Id.* ¶13. In August 2023, Duke informed Parent Plaintiffs that it would not provide such treatment even once Minor became "ready due to H.B. 808 taking effect," with no specification of which provision in the law caused Duke to make this decision. *Id.* ¶15.

Provider Plaintiff works for UNC's Department of Family Medicine, but Provider is bringing claims only in the doctor's "personal capacity on behalf of" patients. Compl.

¶15. Provider's declaration reflects "personal opinions and beliefs and is not made as a representative of UNC or its Department of Family Medicine." Smith Decl., Doc. 14-8, ¶7. Without identifying any patient denied treatment due to the provisions Plaintiffs asked this Court to enjoin, Provider claims to serve approximately 31 transgender adolescents. *Id.* ¶9. "Several of" Provider's "transgender patients rely on Medicaid to fund their health care," but Provider did not provide any particulars about how many of those patients are minors or have been using Medicaid to fund gender transition procedures. *Id.*

ARGUMENT

To prevail on a motion for preliminary injunction, Plaintiffs "must establish that" they are (1) "likely to succeed on the merits"; (2) "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "that the balance of equities tips in [Plaintiffs'] favor"; and (4) "that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. Plaintiffs Failed To Establish Standing Sufficient for the Preliminary Injunction.

No Plaintiff has proven an imminent, irreparable injury that is redressable before trial by this Court preliminarily enjoining enforcement of Sections 1 and 3 of the law. Thus, no Plaintiff has demonstrated a likelihood of standing.

"On a motion for a preliminary injunction, a plaintiff's burden of showing a likelihood of success on the merits necessarily depends on a likelihood that plaintiff has standing." *Action NC v. Strach*, 216 F. Supp. 3d 597, 630 (M.D.N.C. 2016) (cleaned up). To establish standing, a plaintiff must show: (1) "that he suffered an injury in fact that is

concrete, particularized, and actual or imminent"; (2) "that the injury was likely caused by the defendant"; and (3) "that the injury would likely be redressed by judicial relief." *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622, 628 (4th Cir. 2023). "Without standing to sue," Plaintiffs "cannot show that" they are "likely to succeed on the merits." *Speech First, Inc. v. Sands*, 69 F.4th 184, 191-92 (4th Cir. 2023). Furthermore, "the harm" Plaintiffs base their standing on "must be irreparable" to suffice for a preliminary injunction, "meaning that it cannot be fully rectified by the final judgment after trial." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 216 (4th Cir. 2019) (quotation omitted). Plaintiffs have not carried the burden of establishing an imminent, irreparable injury, let alone one that is redressable by a pre-trial preliminary injunction.

The only minor whom Plaintiffs identified as potentially impacted by the law is Minor Plaintiff, but Minor Plaintiff is not threatened by an imminent injury. Minor is not receiving and has not received any prohibited procedure because Minor has not even begun puberty. Voe Decl. ¶¶13-16. "Before puberty, treatment for gender dysphoria does not include any drug treatment or surgical intervention." Adkins Decl. ¶31. Minor is 9 years old and might not begin puberty until age 12—based on what Dr. Adkins told this Court, *id.* ¶43—or until age 14—based on what Dr. Adkins told a court in Arkansas, *Brandt v. Rutledge*, No. 4:21-cv-00450, Trial Transcript, Vol. 1 at 211:13-16 (Oct. 17, 2022) (Exhibit 2). Dr. Adkins, who directs the clinic where Minor sought treatment, has not opined on when Minor will likely begin puberty, and Plaintiffs have not submitted medical records

that could substantiate such claims.[1] Furthermore, Minor has not expressed any imminent interest in obtaining cross-sex hormones or surgical gender transition procedures, so Plaintiffs lack standing to challenge those portions of the law. Even for puberty blockers, Duke requires informed consent from a parent *and* the minor, and Dr. Adkins will not allow a patient to consent until the minor is "age 12 and over." Adkins Decl. ¶42; *see also id.* ¶34; *cf. Kadel v. Folwell*, 620 F. Supp. 3d 339, 364 (M.D.N.C. 2022) ("[T]he youngest Plaintiff received puberty blocking medication when puberty began around age 12.").

Even then, "care is always" supposed to be "individually calibrated," Adkins Decl. ¶59, and "[t]here is not an assumption that certain treatments are appropriate for every patient," *id.* ¶40; *see* Karasic Decl., Doc. 14-4 ¶65. Plaintiffs have not identified *any* medical professional willing to prescribe Minor puberty blockers as pre-trial treatment for gender dysphoria. This Court cannot find a threat of imminent harm based on "the plaintiffs' own testimony," with no "medical testimony that [they] need the treatments at issue and will suffer irreparable harm if it is not provided before the scheduled trial." *Dekker v. Marstiller*, 2022 WL 19394894, at *3 (N.D. Fla. Oct. 24).

Minor also cannot satisfy Article III's redressability requirement because the record does not establish that any medical provider in North Carolina would provide these treatments to Minor even if Sections 1 and 3 are enjoined. True, Duke allegedly told Parents in August that it "would not be able to prescribe puberty-delaying treatment to Victor once

[1] Plaintiffs had the burden to establish standing *when they moved for a preliminary injunction*. This Court should not allow Plaintiffs to submit evidence that Intervenors had no opportunity to review. Further, Dr. Adkins is potentially too conflicted to testify as an expert.

[Minor] was ready due to H.B. 808 taking effect." Voe Decl. ¶15. But Plaintiffs' motion did not request and this Court cannot grant an injunction for the private right of action, so the law would still likely dissuade Duke from providing treatment. *See L.W.*, 83 F.4th at 490-91 (noting, "[a]s a factual and legal matter" when minors *already* receiving gender transition procedures lost access, that their standing was even then "undeveloped and potentially knotty").

Minor and Parent Plaintiffs, therefore, failed to demonstrate that the preliminary injunction would redress an actual, imminent harm that they would otherwise irreparably suffer before trial. Their "speculative chain of possibilities does not establish that injury" is "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013). Even if there *might* be some concern years down the road, any injury is not "so imminent that there is a clear and present need for equitable relief." *Action NC*, 216 F. Supp. 3d at 642 (cleaned up). Future Fourteenth Amendment violations, and anxiety about violations, do not suffice when the claim does not involve competition against others in a discriminatory system. *John & Jane Parents 1*, 78 F.4th at 634-35.

Provider Plaintiff's standing is still more attenuated. Provider "is bringing claims in [Provider's] personal capacity on behalf of [Provider's] patients," Compl. ¶15, so any injury directly to *Provider* does not suffice for Plaintiffs' claims. "For third party standing, a plaintiff must demonstrate (1) an injury-in-fact; (2) a close relationship between itself and the person whose right it seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests." *Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276, 288 (4th Cir. 2021) (cleaned up). Provider gives no reason why litigating via

fictitious names under a protective order and with Plaintiffs' counsel's assistance—as minors have done in numerous similar cases—is a "hindrance" to patients' ability to protect their own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). Patients' parents and guardians have closer relationships, and Provider lacks *any* "relationship" with minors who are not current patients, let alone a "close" one. *Id.*

Worse, despite the law being in effect for over two months, Provider Plaintiff does not identify *any* particular minor patient denied one of the prohibited procedures, or Medicaid coverage thereof, due to Sections 1 or 3. "Several of" Provider's "transgender patients" may "rely on Medicaid to fund their health care," but that does not mean any of Provider's "approximately 31" adolescent patients who are "transgender" are on Medicaid or have been denied Medicaid coverage for the prohibited procedures. Smith Decl., Doc. 14-8 at ¶9. Provider thinks some patients "are ready" to start "hormone therapy." *Id.* ¶27. But Provider does not identify them as minors or Medicaid recipients and notes that they cannot receive such treatment right now anyway. *Id.*

And because Provider is not in this lawsuit "as a representative of UNC or its Department of Family Medicine," Provider simply cannot vouch for whether UNC would provide any gender transition procedure to the unspecified patients if a preliminary injunction issues. *Id.* ¶7. Section 2 would continue to leave UNC vulnerable to civil lawsuits, and UNC might prohibit Provider from taking this litigation risk on its behalf. Provider has publicly acknowledged that Section 2 "scares" Provider and that Provider "worr[ies] something like that is going to scare providers" throughout the State. Makiya

Seminera, *An NC doctor found 'joy' treating transgender youth*, CHARLOTTE OBSERVER (Sept. 24, 2023), https://tinyurl.com/hyt4m7v6.

Even if Provider's supposed personal injury were relevant, none of Provider's rights under the Equal Protection Clause or Affordable Care Act have been violated, and without identifying a minor patient currently seeking prohibited treatment or Medicaid coverage for such treatment, Provider does not even have to worry about the statute limiting Provider's scope of service at UNC.

That leaves the two organizational Plaintiffs, PFLAG and GLMA. Each solely "asserts its claims in this lawsuit on behalf of its members." Compl. ¶¶16-17. Thus they must establish that (1) their "members would otherwise have standing in their own right"; (2) "the interests" they "seek[] to protect are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *SFFA, Inc. v. Harv. Coll.*, 600 U.S. 181, 199 (2023) (quotation omitted). Neither organization has established injury sufficient for a preliminary injunction through the Minor and Parent Plaintiffs or the Provider Plaintiff, the only alleged members mentioned with any specifics.

II. Even if Plaintiffs Have Sufficient Standing, This Court Should Deny Plaintiffs' Motion for a Preliminary Injunction.

Even if Plaintiffs established standing, the Court should still deny their motion because they failed to demonstrate a likelihood of success on the merits, and the equities favor maintaining the status quo.

A. Plaintiffs failed to demonstrate a likelihood of success on the merits.

1. The law does not discriminate by sex or transgender status.

a. The law does not discriminate based on sex.

Under the Equal Protection Clause, sex discrimination is a "preference to members of either sex over members of the other." *Reed v. Reed*, 404 U.S. 71, 76 (1971). The law does not violate this principle because it applies to both males and females the same. Instead, the statute "is best understood as a law that targets specific medical interventions for minors, not one that classifies on the basis of any suspect characteristic under the Equal Protection Clause." *Eknes-Tucker*, 80 F.4th at 1227.

Moreover, a statute regulating *medical procedures* does not trigger heightened scrutiny when it acknowledges sex-based distinctions. "The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny" absent a showing of "invidious discrimination against members of one sex or the other." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2245-46 (2022) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)). Here, the law regulates two sets of *separate* "medical procedure[s] that only one sex can undergo," *id.*, because, for example, "only males can use estrogen as a transition treatment," while "only females can use testosterone as a transition treatment," *L.W.*, 83 F.4th at 481.

True, the law "mention[s] the word 'sex.'" *Id.* at 482. But as the Sixth Circuit asked with respect to a similar law, "how could [it] not?" *Id.* "The point of the hormones is to help a minor transition from one gender to another, and laws banning, permitting, or

otherwise regulating them all face the same linguistic destiny of describing the biology of the procedures." *Id.*; *see Eknes-Tucker*, 80 F.4th 1228.

Plaintiffs' sex-stereotyping argument fails for a similar reason. "Physical differences between men and women are …enduring." *United States v. Virginia*, 518 U.S. 515, 533 (1996). They are "not a stereotype" now, *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 68 (2001), or when the Equal Protection Clause was ratified, *Sex*, WEBSTER'S AM. DICTIONARY OF THE ENGLISH LANGUAGE (1865) (defining "sex" as the "physical difference between male and female"). And this enduring biological reality explains *why* the "regulation of a medical procedure that only one sex can undergo does not trigger heightened scrutiny." *Dobbs*, 142 S.Ct. at 2245-46. Medical regulations that turn on these biological differences "are linked to something other than a sexual stereotype." *Knussman v. Maryland*, 272 F.3d 625, 638-39 (4th Cir. 2001) (applying *Geduldig*). They are not about "stereotypes of how adult men or women dress or behave," *L.W.*, 83 F.4th at 485, or even what bathrooms a high school student should use, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608-09 (4th Cir. 2020).

Further, the diagnosis of gender dysphoria that Plaintiffs rely upon *expressly* turns on sex stereotypes. For example, the criteria for pre-pubertal children, like Minor, asks whether the child has shown a preference "for the toys, games, or activities *stereotypically* used or engaged in by the other gender." Karasic Decl. ¶42 (emphasis added). Thus, the law "targets certain medical interventions for minors meant to treat the condition[s]" such as gender dysphoria, which are expressly diagnosed based on gender stereotypes. *Eknes-Tucker*, 80 F.4th at 1229. But the law *itself* "does not further any particular gender

stereotype." *Id.* Instead, it simply regulates treatments frequently provided for a *diagnosis* that turns on gender stereotypes. *Id.* Plaintiffs cannot circumvent the rational-basis review that normally applies to medical regulations by themselves partaking in sex stereotypes.

Plaintiffs' final halfhearted argument that "discrimination based on gender transition is necessarily discrimination based on sex," PI Memo. 13, lacks any explanation other than irrelevant citations to two Title VII employment discrimination cases.

b. The law does not discriminate based on transgender status.

The Fourth Circuit has held that "heightened scrutiny applies" to laws that discriminate based on transgender status "because transgender people constitute at least a quasi-suspect class." *Grimm*, 972 F.3d at 610. While Intervenors dispute that holding and reserve their right to challenge it, even if it were correct, it would not apply here based on the testimony of Plaintiffs' own experts. That is because the law regulates gender transition procedures broadly, prohibiting treatment of transgender and non-transgender minors alike.

The Fourth Circuit has defined transgender people to mean only "people who 'consistently, persistently, and insistently' express a gender that, on a binary, we would think of as opposite to their assigned sex." *Id.* at 594. Plaintiffs argue that the law discriminates against transgender people because "[o]nly transgender people can suffer gender dysphoria." PI Memo. 9 (citing Olson-Kennedy Decl., Doc. 14-5 ¶30). But the law prohibits gender transition procedures for minors regardless of whether a minor is diagnosed with gender dysphoria, and gender dysphoria is not a proxy for transgender status anyway. The very expert Plaintiffs rely upon for this proposition frequently admits

that distinct other groups such as the "gender diverse," Olson-Kennedy Decl. ¶51, "non-binary youth," *id.* ¶60, and others outside the "transgender" and "cisgender" groupings, *id.* ¶38, can either be diagnosed with gender dysphoria or receive gender transition procedures. Prohibiting medical professionals from providing gender transition procedures regardless of transgender status (or gender dysphoria diagnosis) does not classify based on transgender status. If Plaintiffs' best case for ruling otherwise is one that interpreted a statute a different way "as a matter of constitutional avoidance," PI Memo. 9 (citing *Williams v. Kincaid*, 45 F.4th 759, 772 (4th Cir. 2022)), then that is all the more reason to *avoid* declaring this statute unconstitutional.

Even if a law were to regulate only treatment of transgender minors diagnosed with gender dysphoria, heightened scrutiny still would not apply. It does not trigger heightened scrutiny to "restrict[] a specific course of medical treatment that, by the nature of things, only gender non-conforming individuals may receive." *Eknes-Tucker*, 80 F.4th at 1229. As in *Geduldig*, a classification based on pregnancy is not per se sex discrimination despite the "tru[th] that only women can become pregnant." 94 S.Ct. at 2485 n.20. So too here *even if* the law only applies to the subset of transgender minors diagnosed with gender dysphoria.

c. The legislature had no invidiously discriminatory animus.

Plaintiffs try one last end-run around rational-basis review on their Equal Protection claim by arguing, based on the title of the law, that the General Assembly enacted it for an improper purpose. PI Memo. 11-12. The Supreme Court "has long disfavored arguments based on alleged legislative motives" and requires "invidiously discriminatory animus."

Dobbs, 142 S.Ct. at 2246, 2255. And "[o]n the few occasions where" the Supreme Court has held that a law fails rational basis, the "common thread has been that the laws at issue lack *any* purpose other than a bare … desire to harm a politically unpopular group." *Trump v. Hawaii*, 138 S.Ct. 2392, 2420 (2018) (cleaned up) (emphasis added). Plaintiffs' disagreement with the General Assembly's judgment that prohibiting gender transition procedures *protects* minors is no more proof of animus than plaintiffs in *Dobbs* complaining that the goal of preventing abortion harms women. *Id.* at 2246.

Plaintiffs cite nothing from the legislative record for *this* law and instead attack other laws like a Parents' Bill of Rights requiring age-appropriate instruction for elementary schoolers, S.L. 2023-106 (S.B. 49), and protecting athletic opportunities for biological girls in middle and high school, S.L. 2023-109 (H.B. 574). Even further afield, Plaintiffs try to hold North Carolina responsible for laws introduced or enacted *in other States*, including the similar Tennessee and Kentucky prohibitions that the Sixth Circuit upheld.

2. Parents have no right to experimental and harmful treatments.

Parent Plaintiffs purport to have discovered a constitutional right to obtain puberty blockers, cross-sex hormones, and surgeries to gender transition their child. But their analysis falls well short of the Supreme Court's requirements for a "substantive" Due Process right. That test requires that the right is "fundamental" or "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). "But the use of these medications in general—let alone for children—almost certainly is not 'deeply rooted' in our nation's history." *Eknes-Tucker*, 80 F.4th at 1220. The "earliest-recorded uses of puberty blocking medication and cross-sex hormone treatment

for purposes of treating the discordance between an individual's biological sex and sense of gender identity did not occur until well into the twentieth century." *Id.* at 1220-21; *see L.W.*, 83 F.4th at 466-67.

In light of this history, Plaintiffs seek to raise the level of generality for the asserted right. They primarily rely on principles discussed in *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion), and in *Parham v. J.R.*, 442 U.S. 584, 602 (1979). But because courts seek to "exercise the utmost care whenever" they "are asked to break new ground in th[e] field" of substantive Due Process, they require "a careful description of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721. Plaintiffs' use of *Troxel* "climb[s] up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children—that the case law and our traditions do not support." *L.W.*, 83 F.4th at 475. And "*Parham* does not at all suggest that parents have a fundamental right to direct a particular medical treatment for their child that is prohibited by state law." *Eknes-Tucker*, 80 F.4th at 1223.

Indeed, there is not even a "historical recognition of a fundamental right of *adults* to obtain the medications at issue for themselves." *Id.* at 1224 n.18 (emphasis added). Therefore, "it would make little sense for adults to have a *parental* right to obtain these medications for their children but not a *personal* right to obtain the same medications for themselves." *Id.* The FDA also has not approved these drugs to treat gender dysphoria. *L.W.*, 83 F.4th at 488. Parents do not "have a derivative fundamental right to obtain a particular medical treatment for their children as long as a critical mass of medical professionals approve." *Eknes-Tucker*, 80 F.4th at 1224; *see also L.W.*, 83 F.4th at 473-75

(citing *Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695, 703 (D.C. Cir. 2007) (en banc)).

3. The law satisfies any level of review.

The law, "like other health and welfare laws, is entitled to a strong presumption of validity." *Dobbs*, 142 S.Ct. at 2284. "This opening presumption of legislative authority to regulate healthcare gains strength in areas of 'medical and scientific uncertainty.'" *L.W.*, 83 F.4th at 473 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). Because the law does not trigger heightened scrutiny, it is subject only to rational-basis review.

Nevertheless, the law satisfies any level of scrutiny. Even if strict scrutiny applies, the law survives, since States "have a compelling interest in protecting children from drugs, particularly those for which there is uncertainty regarding benefits, recent surges in use, and irreversible effects." *Eknes-Tucker*, 80 F.4th at 1225. And the unknown long-term effects of these treatments, when combined with the impossibility of identifying who will persist in their identity as transgender, *see L.W.*, 83 F.4th at 487 (citing stories of detransitioners), underscore that the law is necessary to *adequately* serve the compelling interest of protecting minors.

The law satisfies intermediate scrutiny as well. North Carolina clearly "has an 'exceedingly persuasive justification' for regulating these drugs"—which sterilize children, stunt their natural physical development, and risk serious impacts on brain development—and these surgeries—which remove or alter physically healthy body parts. *Eknes-Tucker*, 80 F.4th at 1235 (Brasher, J., concurring). And those are just some of the most direct risks already identified for these experimental treatments. The "uncertainty

about how to tell which patients need these interventions for this purpose and which don't" is yet another exceedingly persuasive justification for protecting minors until they can make more mature, long-term decisions about their own bodies. *Id.* Thus, "even if [North Carolina's] statute triggered intermediate scrutiny, it would likely survive that heightened scrutiny." *Id.* at 1234.

4. The law does not violate the Affordable Care Act.

Plaintiffs' Section 1557 argument rests largely on district court opinions currently under review by the en banc Fourth Circuit, including this Court's rulings in *Kadel v. Folwell* about the North Carolina State Health Plan's "categorical exclusion of coverage" for sex-change treatments. 620 F. Supp. 3d at 354. Intervenors disagree with and reserve the right to challenge those rulings. But, even taking this Court's reasoning in *Kadel* as a given, Section 3's tailored prohibition of state funding for gender transition procedures *for minors* is a much "more narrow exclusion" than a blanket prohibition for all ages. *Id.* at 381. Minors will have access to gender transition procedures when they mature into adults. North Carolina has an obligation to manage its budget well rather than spending money on procedures for minors that are "in truth still experimental," even if they have been available to adults for a longer time. *L.W.*, 83 F.4th at 488. Plaintiffs have not identified comparable psychiatric conditions in minors that North Carolina pays to treat with puberty blockers, cross-sex hormones, and similar surgeries. And gender transition procedures are prohibited for transgender and non-transgender minors alike. Declining to pay for gender transition procedures for minors is "a permissible policy choice." *Knussman*, 272 F.3d at 638.

Even so, there is good reason to doubt that *Bostock*'s Title VII ruling applies to Section 1557, which incorporates its standard from Title IX instead. *See* 42 U.S.C. §18116(a). Title IX repeatedly acknowledges the biological binary separating "students of one sex" from "students of the other sex." 20 U.S.C. §1681. "Based on sex" in Title IX does not mean "based on sexual orientation or gender identity." *See Neese v. Becerra*, 640 F. Supp. 3d 668, 677-80 (N.D. Tex. 2022). The employment setting is less comparable to medical treatment for minors than the education setting. There is no discrimination on the basis of sex under Section 1557.

B. Plaintiffs have not satisfied remaining preliminary-injunction factors.

"[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1301 (2012) (Roberts, C.J., in chambers); *see L.W.*, 73 F.4th at 421. Plaintiffs, in contrast, have failed to establish that any irreparable harm will occur to any identifiable minor if this Court waits to issue an injunction until after trial. Plaintiffs disagree about whether gender transition procedures harm minors, but North Carolina's "elected representatives made these precise cost-benefit decisions" in adopting the law. *Id.* Here, North Carolina's "interests in applying the law to its residents and in being permitted to protect its children from health risks weigh heavily in favor of the State at this juncture." *Id.* at 421-22.

The equities do not favor parties that sit on the sidelines week-after-week before suddenly declaring that they need a preliminary injunction. Plaintiffs belatedly insist that *Defendants* seek to "disturb[] the status quo." PI Memo 8. But, even under their most

aggressive definition of the status quo, Plaintiffs have not identified *any* minor who was receiving or was even eligible for gender transition procedures before the General Assembly enacted the law but who now is not solely because of Sections 1 and 3. At whatever "last uncontested status between the parties which proceeded the controversy," *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2016), Minor was still prepubescent and years away from being able to consent to puberty blockers, and Provider was not providing or preparing to provide gender transition procedures to any minor who cannot now receive them. Section 1 does not even apply when the course of treatment began before August 1. N.C. Gen. Stat. §90-21.152(b).

III. The Scope of Plaintiffs' Requested Relief is Inappropriately Broad.

Even if this Court concludes that Plaintiffs are entitled to injunctive relief, Plaintiffs have failed to demonstrate that the scope of relief they request is appropriate. To start, the proposed order Plaintiffs filed yesterday requesting an injunction against enforcement of the law *in its entirety*, Proposed Order 1-2, is flatly inconsistent with their motion requesting an injunction to stop Defendants "from enforcing Sections 1 and 3" *only*, PI Mot. 3. To be clear, Supreme Court precedent prohibits federal courts from enjoining enforcement of private causes of action like Section 2. *See Whole Woman's Health v. Jackson*, 142 S.Ct. 522, 535 (2021); *see also* S.L. 2023-111 §4 (statutory severability clause).

With respect to statewide relief, "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *PBM Prods., LLC v. Mead Johnson & Co.*, 639 F.3d 111, 128 (4th Cir. 2011). This is not a certified class

action, and Plaintiffs do not represent every one of the over 10 million North Carolinians that a statewide injunction would impact. *See L.W.*, 73 F.4th at 490. At a minimum, relief cannot run to non-Plaintiffs.

Instead, courts "must operate in a party-specific and injury-focused manner." *Id.* Because Minor Plaintiff seeks only puberty blockers as a gender transition treatment, Plaintiffs have not demonstrated that anyone is injured sufficient to challenge the cross-sex hormone and surgery prohibitions. PFLAG has not demonstrated that all members of its "17 chapters throughout the state" are injured; many are likely adults without children at risk of losing access to gender transition procedures solely due to Section 1, the only portion of the law they challenge. PI Memo. 25. So any injunction of Section 1's enforcement should apply only to Minor and Parent Plaintiffs and only regarding the puberty blocker provision.

Nor has any GLMA member, including Provider Plaintiff for Provider's maximum of 31 transgender adolescent patients, demonstrated loss of the ability to provide treatment to an identifiable patient. Moreover, granting all GLMA members a preliminary injunction might allow them to override the will of parents who chose not to sue and who might not want their children to undergo a gender transition procedure. If Provider Plaintiff and GLMA lack an irreparable injury, then no injunction can prevent enforcement of Section 3, the state funding provision. And even if Provider's supposed injury gives GLMA standing, Provider mentioned only Medicaid, so the Section 3 injunction could not run against any other state funding and even then should be limited to Provider's few, if any, minor patients seeking Medicaid coverage for transition.

With respect to whether Plaintiffs are entitled to facial, as opposed to as-applied relief, "litigants mounting a facial challenge to a statute normally must establish that *no set of circumstances* exists under which the statute would be valid." *United States v. Hansen*, 143 S.Ct. 1932, 1939 (2023) (cleaned up). Plaintiffs do not argue the law is unconstitutional in *every* circumstance. Nor could they, since the substance of their constitutional claims turns entirely on WPATH and Endocrine Society guidelines (that not all doctors follow).

Thus, even under Plaintiffs' theory, the General Assembly may clearly regulate the provision of interventions not in accordance with those guidelines. This regulation would include prohibiting the provision of any gender transition procedure to any child before puberty; providing any gender transition procedure to a minor not formally diagnosed with gender dysphoria under the DSM-5; providing any gender transition procedure when an individual's co-occurring mental-health issues may interfere with diagnostic clarity or the ability to provide informed consent; and providing any gender transition procedure to a minor whose parents do not consent.

CONCLUSION

The Court should deny the preliminary injunction motion or, in the alternative, limit the requested injunction's scope.

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Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Memorandum, including body, headings, and footnotes, contains 6,250 words as measured by Microsoft Word.

/s/ Craig D. Schauer
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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on November 3, 2023, I electronically filed the foregoing Memorandum with the Clerk of the Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

/s/ Craig D. Schauer
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