

# PUBLICATION

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## History and Future of the Nation's First Ban on Gender-Affirming Care

Authors: Tyler W. Saenz  
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Across the United States, there is a trend of state legislatures passing laws that restrict, or even outright prohibit, transgender minors from access to gender-affirming care, including puberty blockers, hormone therapy, gender reassignment surgery, and insurance coverage for gender-affirming care. These laws have significant ramifications for patients, health care providers, and health insurers, thus it is important not only that employers provide various insurance coverage options for employees but also that the health care industry remain aware of the legal status of these laws in each state. Arkansas was the first state to pass legislation making gender-affirming medical care illegal, so legal challenges to the law could serve as important future precedent.

### Background of the Arkansas Legislation

In May 2021, the Arkansas Legislature overrode a veto from then-Governor Asa Hutchinson and passed the Save Adolescents From Experimentation Act, House Bill 1570, or Act 626 (the Act), which bans physicians or other health care professionals from providing gender transition medical procedures, including hormone therapy and gender reassignment surgery, to any individual under 18 years old (minor(s)). Additionally, a physician or health care professional may not refer any minor to a physician or health care professional for these services. The Act also prohibits public funds, either directly or indirectly, to be used, granted, paid, or distributed to any entity, organization, or individual that provides gender transition procedures to a minor, including reimbursement for the procedure by the Arkansas Medicaid Program. Private insurers are allowed to refuse to cover transgender-related health services. Any referral or provision of gender transition procedures is subject to disciplinary action by the appropriate licensing entity or disciplinary review board. Finally, an individual or the Arkansas Attorney General may bring an action, either in civil or criminal court, to enforce the Act.

### Litigation and the Arkansas Act

Since the Act was passed, at least 19 other states have passed similar laws prohibiting physicians from providing gender transition procedures to minors. Within days of passing the Act, four transgender Arkansas minors, their parents, and two physicians filed a lawsuit against the Arkansas Attorney General's office with representation from the ACLU. On June 20, 2023, United States District Judge James Moody ruled in favor of the plaintiffs and issued a permanent injunction. *Brandt v. Rutledge*, 677 F.Supp.3d 877 (E.D. Ark. June 20, 2023). In *Brandt*, Judge Moody ruled that the Act was unconstitutional, noting that:

- Evidence based on decades of clinical experience and scientific research showed gender-affirming medical care can relieve the clinically significant distress associated with gender dysphoria in adolescents. The State failed to provide sufficient evidence that the banned treatments were ineffective or experimental. (*Brandt*, 919-920);
- The State failed to provide sufficient evidence that the Act's ban on transgender care was justified by the risks of the procedures. The evidence at trial showed that the risks associated with gender-

affirming care for adolescents were no greater than the risks associated with many other procedures not prohibited by the Act. (*Brandt*, 920-921);

- The State failed to provide sufficient evidence that minors with gender dysphoria will desist with age. Evidence proved that there was a broad consensus in the medical field that once adolescents reach the early stages of puberty and experience gender dysphoria, it is very unlikely they will subsequently identify as cisgender or desist. (*Brandt*, 921); and
- The Act prohibits medical care on the basis of sex, and the State had failed to meet its demanding burden of proving the Act advances its articulated interests. The Court ruled that the Act violated plaintiffs' rights to equal protection. (*Brandt*, 922).

Additionally, the *Brandt* Court found that the Act failed to pass constitutional muster under the due process analysis. Specifically, the Act took away the plaintiff parents' fundamental right to provide health care for their children and gave said right to the Arkansas Legislature, and the State failed to narrowly tailor the Act when it banned all gender transition procedures (*Brandt*, 923-924). Finally, the *Brandt* Court ruled that the Act violated the First Amendment rights of physicians and health care professionals because "it restricts health care professionals from making referrals for 'gender transition procedures' only, not for other purpose...as a content and viewpoint-based regulation, it is 'presumptively unconstitutional' and is subject to strict scrutiny." (*Brandt*, 924-926).

## Future of the Arkansas Act

Following the *Brandt* ruling, Arkansas appealed the ruling to the Eighth Circuit Court of Appeals and was granted an *en banc* hearing. The Eighth Circuit is the first federal appeals court to delve into the merits of state bans on transgender procedures for minors. As of today, the Eighth Circuit is still taking the arguments under consideration, and there is no indication when a decision will be reached.

However, on June 11, 2024, the Northern District of Florida found Florida's law that banned gender affirming care for children and limited it for adults was unconstitutional and discriminatory. Any appeal of the decision would also go to the Eleventh Circuit Court of Appeals. Tellingly, in a legal challenge concerning gender-affirming care for an adult, on May 13, 2024, the Eleventh Circuit Court of Appeals ruled that a Georgia county health plan's refusal to cover a sheriff deputy's gender-affirmation surgery violated Title VII of the Civil Rights Act of 1964 (*Lange v. Houston County, Georgia*, 2024 WL 2126748 (11th Cir. 2024)). In *Lange*, the Houston County Sheriff's office and its health insurance provider denied the deputy's request for coverage for sex reassignment surgery after her health care providers determined it was medically necessary following her hormone therapy. The district court granted summary judgment in favor of the deputy finding facial discrimination as a matter of law, a clear violation of Title VII, and awarded the deputy \$60,000 in emotional damages. The Eleventh Circuit affirmed the district court's ruling, stating "insurance coverage conditioned upon one's protected status violates Title VII."

*Brandt* and *Lange* both demonstrate the enormous ramifications facing the health care industry and employers related to gender-affirming care. The United States Supreme Court has not yet reviewed a state ban on transgender procedures for minors, so the future of laws like the Act is unclear. However, it is important that health care providers and health insurers remain vigilant of the ongoing legal landscape.