

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

DYLAN BRANDT, et al.,
Plaintiffs,

v.

LESLIE RUTLEDGE, et al.,
Defendants

No. 4:21CV00450 JM
October 21, 2022
Little Rock, Arkansas
9:01 AM

TRANSCRIPT OF BENCH TRIAL - VOLUME 4
BEFORE THE HONORABLE JAMES M. MOODY, JR.,
UNITED STATES DISTRICT JUDGE

APPEARANCES:

On Behalf of the Plaintiffs:

MR. CHASE STRANGIO, Attorney at Law
MS. LESLIE COOPER, Attorney at Law
MR. JAMES D. ESSEKS, Attorney at Law
MS. LISA NOWLIN-SOHL, Attorney at Law
American Civil Liberties Union
125 Broad Street, Suite 1800
New York, New York 10004-2400

MS. BREEAN WALAS, Attorney at Law
Walas Law Firm, PLLC
Post Office Box 4591
Bozeman, Montana 59772

MR. AVIV S. HALPERN, Attorney at Law
MS. LAURA KABLER OSWELL, Attorney at Law
Sullivan & Cromwell, LLP
1870 Embarcadero Road
Palo Alto, California 94303

MR. GARY L. SULLIVAN, Attorney at Law
ACLU of Arkansas
Legal Division
904 West 2nd Street, Suite One
Little Rock, AR 72201

1 APPEARANCES CONTINUED:

2 MR. ARUN BODAPATI, Attorney at Law
MS. LAUREN M. GOLDSMITH, Attorney at Law
3 MR. ALEXANDER F.R. PEACOCKE, Attorney at Law
MS. REBECCA KADOSH, Attorney at Law
4 MR. JONATHAN G. LESTER, Attorney at Law
Sullivan & Cromwell, LLP
5 125 Broad Street, Suite 2424
New York, NY 10004-2498

6
7 MR. DANIEL J. RICHARDSON, Attorney at Law
Sullivan & Cromwell LLP
1700 New York Avenue
8 Washington, DC 20006

9 MS. SHARON ELIZABETH ECHOLS, Attorney at Law
Gill Ragon Owen P.A.
10 425 West Capitol Avenue, Suite 3800
Little Rock, AR 72201-2413

11 On Behalf of the Defendants:

12 MR. DYLAN JACOBS, Attorney at Law
13 MR. MICHAEL CANTRELL, Attorney at Law
MS. AMANDA LAND, Attorney at Law
14 MS. HANNAH TEMPLIN, Attorney at Law
Arkansas Attorney General's Office
15 323 Center Street, Suite 200
Little Rock, Arkansas 72201

16 On Behalf of witness Janet Cathey:

17 MR. STEVEN SHULTS, Attorney at Law
Shults Law Firm, LLP
18 200 West Capitol Avenue, Suite 1600
19 Little Rock, Arkansas 72201

20 On Behalf of witness Stephanie Ho:

21 MS. BETTINA E. BROWNSTEIN, Attorney at Law
Bettina A. Brownstein Law Firm
22 904 West Second Street, Second Floor
23 Little Rock, Arkansas 72201

24 *Proceedings reported by machine stenography.*
25 *Transcript prepared utilizing computer-aided transcription.*

INDEX - VOLUME 4 (10/21/2022)			
WITNESS FOR DEFENDANTS: Direct Cross Redirect			
CATHY CAMPBELL [Proceedings under separate cover.]			
STEPHANIE HO	733	745	750
JANET CATHEY	753	773	
EXHIBITS RECEIVED:			PAGE
Defendants' 59			765
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

1 (Proceedings commencing in open court at 9:01 AM)

2 THE COURT: Good morning. We're back on the
3 record. Is the -- I guess the order of proof now is the
4 defendants are going to put on some witnesses. Is that
5 correct?

6 MR. JACOBS: Yes, Your Honor.

7 THE COURT: I guess before we get started. You
8 wanted your opportunity to -- first of all, are the
9 plaintiffs resting?

10 MR. STRANGIO: Good morning, Your Honor. Just
11 one housekeeping matter. I believe the only outstanding
12 item is the 160 documents that Your Honor is reviewing in
13 camera.

14 THE COURT: And designation -- and the
15 deposition designations and -- you're kind. Thank you for
16 saying it's just that, but it's a little more than that.

17 MR. STRANGIO: Yes, but plaintiffs rest subject
18 to any possible documents that would have to be introduced
19 potentially during the week of the 28th. But subject to
20 that, plaintiffs rest.

21 THE COURT: As to your witnesses, you're resting
22 and you have submitted exhibits that I will rule on. So
23 subject to that, I understand. And there won't be any
24 further submissions I guess is what is fair to say.

25 MR. STRANGIO: Your Honor, that's largely right.

1 THE COURT: In the way of exhibits or witnesses.

2 MR. STRANGIO: In the way of exhibits or
3 witnesses thus far with respect to the designations. I
4 believe there are still the documents that Your Honor is
5 reviewing. So if we were to receive one of those
6 documents after your view in camera and would need to
7 separately proffer them, but if you're taking the position
8 that you're going to review them separately and take them
9 under advisement subject to whatever outstanding
10 objections that defendants have, but our understanding
11 with respect to the documents that you're reviewing in
12 camera is Your Honor is still making a decision as to
13 which ones of those would be turned over to plaintiffs.

14 THE COURT: So to be clear, it's possible but
15 unlikely any additional documents are going to be done.

16 My question so counsel for the legislators was, when
17 I was reviewing emails, it didn't appear that I was
18 getting the entire email chain or attachments. Some
19 people were sending emails to themselves in a way of a
20 to-do list, which I do and -- whether you're texting
21 yourself or emailing yourself. It was a second phase
22 deeper dive into those documents I'd already reviewed. So
23 it wasn't clear to me who was being copied on certain
24 email chains at a much deeper level because I wasn't able
25 to follow. And that's what that second request was for.

1 I spoke with counsel who was providing the documents,
2 and they said they would try to get that further level of
3 CCs, blind CCs, attachments, or whatever. And that is --
4 I guess what I'm saying is, I was 95 percent there when I
5 made my initial ruling and was curious about this last
6 five percent. So I will still get you that ruling, but
7 I'm not sure what it's going to yield.

8 MR. STRANGIO: Understood, Your Honor. Just on
9 the off chance there would be an additional document to
10 proffer to the Court after that time, we would rest
11 subject to that, but otherwise plaintiffs rest.

12 THE COURT: Okay.

13 MR. STRANGIO: Thank you, Your Honor.

14 THE COURT: If you don't mind, if you are going
15 to go straight into that, if you can go to a podium or --
16 the distance from your mouth to the microphone is my
17 concern.

18 MR. JACOBS: So I think I was going to just
19 raise, if I could, just the scheduling again. Just I
20 wanted to confirm, further update.

21 So we got all of our witnesses confirmed availability
22 for November 28 through December 1. Out of that, we think
23 November -- the Wednesday, November 30, can be a morning
24 only and then the Court would have the afternoon free.

25 With the other three days, I think we will at least

1 stretch from morning into the afternoon and so --

2 THE COURT: Half day is plenty. Do what you
3 want with the other three days.

4 MR. JACOBS: I didn't know if the Court was
5 interested in whether it could get a schedule for the
6 30th. I can represent that that's feasible. So I wanted
7 to give that information.

8 THE COURT: We'll probably use that half day on
9 the 30th, but I won't book anything other than a lunch
10 hour on the remaining three days.

11 MR. JACOBS: Okay. Just so I can confirm --

12 THE COURT: Or anything before 1:30 on that
13 Wednesday so.

14 MR. JACOBS: Understood. Just so I can confirm
15 with our witnesses, I think plaintiffs said they're good
16 with the schedule.

17 Can I go back on the understanding that this is the
18 -- going to be the schedule?

19 THE COURT: You may.

20 MR. JACOBS: Thank you, Your Honor. That's all
21 I have for that.

22 I'm fine with coming to the podium. I could also
23 just sit and go --

24 THE COURT: Whichever, so long as my court
25 reporter is satisfied with getting a good recording. I

1 don't have a preference.

2 MR. JACOBS: Okay. For this type of motion --

3 THE COURT: Suits me.

4 MR. JACOBS: So the defense would move for
5 judgment as a matter of law. We don't think that the
6 evidence that's been produced by plaintiffs in their case
7 in chief entitles them to relief on any of their legal
8 claims. So I'll sort of take these in other words
9 briefly.

10 Whether the SAFE Act is sex selective and the subject
11 of heightened scrutiny, I recognize at this point the
12 Court is bound by the panel decision on that, so we
13 continue to maintain that the Act does not discriminate
14 based on sex. We've heard testimony about the procedures,
15 and we think that it's clear that the gender transition
16 procedures that the Act prohibits are not the same as
17 other indicated uses of these medications, even if it
18 happens to be the same drug that is used in these
19 different procedures.

20 As to puberty blockers, we think there's no
21 difference in treatment between men and women, male and
22 females. It's the same protocol. The act operates the
23 same as to both sexes. As to cross-sex hormones, the
24 evidence shows that using, for example, testosterone for
25 delayed puberty in boys is not the same thing as using it

1 in gender transition for girls. Different clinical
2 indications, different treatment purposes. The witnesses
3 confirm that there is largely no medical indication for
4 cross-sex hormones beyond the gender transition procedures
5 at issue.

6 As to surgeries, we haven't really heard much
7 testimony on the surgeries. I think some have been
8 mentioned. I think the main surgery that plaintiffs claim
9 raises a sex selective restriction is gynecomastia surgery
10 versus mastectomies. I think those are not the same
11 procedures. There are different clinical indications for
12 diagnosing whether those are needed. They're for
13 different purposes. I think the -- what's colloquially
14 referred to as bottom surgeries are different enough that
15 that speaks for itself.

16 So for that reason we don't think the -- there is any
17 sex selectivity that would raise heightened scrutiny,
18 again, not withstanding the panel's ruling at this point.

19 The second equal protection claim: Whether
20 transgender status is a suspect or quasi suspect class, an
21 issue the Court isn't bound by the panel decision on
22 because it didn't address it. So we continue to maintain
23 that the Court should not recognize a novel quasi suspect
24 class. The Supreme Court hasn't recognized new quasi
25 suspected classes like this since sort of the modern era.

1 It hasn't been done with regard to individuals with
2 developmental disabilities. It hasn't been done with
3 regard to homosexuals. And we don't think that the Court
4 should do it with this classification either.

5 As far as historical discrimination as a class, which
6 is an element of what the Supreme Court has said is
7 required to recognize a quasi suspect class, there wasn't
8 really any evidence in the record about sort of the
9 historical case like you'd see from an expert witness or a
10 historian, the types of things that you might see like in
11 the trial we did a few months back in the voting rights
12 case where there was expert witnesses who testified as the
13 history of this. We don't have that.

14 There's been a lot of testimony sort of relevance to
15 whether transgender status is an immutable characteristic.
16 I think we've had acknowledgement from every expert on the
17 plaintiffs' side that gender identity is not actually
18 immutable, which has been their legal case. It can and
19 does change over time. And there may be dispute over who
20 can change it and the degree to which it can change, but I
21 think all of them have acknowledged that it can change,
22 and one's understanding of one's gender identity
23 separately evolves over time.

24 The experts recognize that there are individuals who
25 transition into another gender identity and then

1 transition back into the first one or into a different
2 one. And at least Dr. Adkins acknowledges that that is an
3 actual change or can be in those individual's gender
4 identities or it could be a change in the understanding.

5 That's, I think, opposite the position the plaintiffs
6 have taken in terms of their legal case, that transgender
7 status is an immutable characteristic. So we think that
8 that defeats the claim that this is a quasi suspect class.

9 On the substantive due process claim, the parental
10 rights claim, I think it's important to clarify what the
11 right at issue actually is. There is a historical right
12 of parents to make medical decisions on behalf of their
13 children, but that's a recognition that children lack
14 legal capacity to do that. But since they can't make a
15 decision legally, someone has to. So the parents step in
16 -- into the shoes of their children to choose for them.

17 The right the plaintiffs are trying to get recognized
18 is something different. It's not who makes the decision.
19 It's what decisions can be made. And so the -- whatever
20 the bounds of the substantive due process right that does
21 exist in this area, it's the right for parents to make a
22 decision instead of their child rather than someone else
23 making the decision in place of the parent. It's not a
24 right to open up the universe of what decisions are
25 available to be made under state law.

1 So we don't think that the Court ought to recognize
2 this entirely novel substantive due process right in it's
3 final ruling. Again, that's an area where the Court is
4 not bound by either its prior ruling or the panel ruling
5 because the panel ruling didn't address that issue.

6 The last issue, the free speech claim. There hasn't
7 really been testimony or at least not very much on the
8 impact of the SAFE Act on provider referrals. The
9 remaining plaintiff in this case, Dr. Stambough, didn't
10 testify about providing referrals for these sorts of
11 treatments, whether it's hormone treatments or surgeries.
12 There's nothing in the record about that.

13 There's testimony that the clinic is still seeing
14 patients, new patients, but they're not being provided the
15 gender transition procedures that are prohibited by the
16 SAFE Act. There's no testimony in the record on
17 plaintiffs' case that those procedures are being -- or
18 referrals are being provided for those patients elsewhere.
19 I think that at least is a standing issue because there's
20 been no testimony about injury, that these referrals are
21 actually something that would happen absent the SAFE Act.

22 THE COURT: Doesn't the SAFE Act prohibit the
23 referrals?

24 MR. JACOBS: It does, Your Honor.

25 THE COURT: Isn't the SAFE Act suspended now so

1 there's no need to refer until and unless the SAFE Act --
2 I mean, I guess there's a potential that you need to refer
3 because you don't have the skills or the facilities to
4 address a certain issue. I mean, that's usually why
5 people get referred for other diseases, like to the Mayo
6 Clinic for cancer because they have a different capacity,
7 I guess is the way I'm trying to say it, but I'm -- I'm
8 trying to process what you're saying about the First
9 Amendment claim is that the claim would be, if this ban on
10 transgender treatment is in effect, then we would have to
11 refer these patients out of state, and it's at that point
12 in time that we couldn't -- that our -- that the damage
13 would -- I guess the harm would be done to us.

14 So I guess I'm trying to use Mr. Cantrell's
15 chicken-or-the-egg comment that it's not until they can't
16 do things the referrals are needed. And I know that
17 that's perhaps not of record, but that's what's been
18 briefed and understood it to be; that should we not be
19 able to do it as a doctor, at that point, our First
20 Amendment rights are infringed because we can't even
21 referral it elsewhere.

22 I only say that because I'm going to have to address
23 all of is this, and I want you to have the opportunity to
24 frame your argument around the evidentiary issue on that.

25 MR. JACOBS: I think I understand.

1 So I think there are maybe sort of three levels to
2 the standing issue. I think Your Honor was on one of
3 them. So I think the first one is whether referrals are
4 happening today that would or would not happen with the
5 SAFE Act in place. I think the point that I was making is
6 that -- so I think the testimony was that nobody performs,
7 for example, the surgeries in Arkansas. So, necessarily,
8 any Arkansas patients would have to be referred out for
9 surgeries. I think -- I don't recall any testimony that
10 any referrals like that are actually happening now. I
11 think the most was maybe someone given a name and it
12 wasn't one of the actually providers at issue here. So I
13 think -- that I think is sort of a lack of evidence about
14 the injury on the surgery point.

15 And in terms of the hormonal treatments at issue
16 currently, so I think the testimony from Dr. Hutchison and
17 Dr. Stambough was that, for example, the Children's gender
18 clinic is no longer seeing new patients. Excuse me. They
19 are seeing new patients, but they're not providing them
20 these procedures that the Act prohibits. And there was no
21 testimony that those patients who currently, absent the
22 effect of the law, are not getting these treatments from
23 the Children's gender clinic -- there is no testimony that
24 they're right now being referred elsewhere, whether in
25 state or out of state. So I think that is additionally

1 sort of the lack of testimony about the injury.

2 And then I think the third step of that, which is
3 what Your Honor was getting to, of whether, if the Act
4 went into effect, would the current patients have to be
5 referred out and then perhaps there would be an injury on
6 the physician then. I'm not sure that there was actually
7 testimony to that effect. So I think -- I don't know that
8 there is evidence to establish standing even on that
9 because I don't think anybody talked about it.

10 Then separately from the standing issue whether this
11 is a speech restriction, our position continues to be that
12 this is not an actual speech restriction. It's a conduct
13 restriction, the conduct being the practice of medicine.
14 Providing a referral is a medical decision that's made
15 based on medical judgment. It's not really speech. To
16 the extent that there is sort of speech necessary for the
17 conduct of communicating this, I think that's incidental.

18 There are all sorts of professional regulations that
19 could be stretched to sort of look like speech even though
20 we kind of think of them as conduct regulations. I think
21 the clearest example that I would make -- or the
22 comparison I guess would be the restriction on an attorney
23 in a case talking with an opposing party who is
24 represented by counsel. So I think everyone would think
25 of that --

1 THE COURT: Even in that case, they can talk to
2 the client. They just can't do it without their attorney
3 present.

4 MR. JACOBS: But assuming the attorney isn't
5 present, then you have that --

6 THE COURT: Right. But the actual speech, the
7 actual talking to the opposing party's client, is not
8 restricted. It's only the means in which they can do
9 that. They have to be chaperoned, for lack of a better
10 term, and they ask and say the exact same thing. Their
11 speech isn't abridged. It's just a protection to the
12 opposing client's -- opposing party that they have their
13 lawyer present, similar to Miranda. I mean, that's a
14 stretch, but you know what I'm talking about.

15 So that's not a restriction on what's being said.
16 That's a restriction on who needs to be present to say
17 those things. If I follow your argument.

18 MR. JACOBS: I think, if we viewed it that way,
19 it would be a time, place, and manner restriction on
20 speech as in, there is a -- you know, the attorney being
21 there or not is a time, place, and manner. So I think that
22 is saying that it's -- conceiving it as a speech
23 restriction when I think sort of my larger point is that I
24 don't think that we really think of that as a speech
25 restriction as all. We think of it as a restriction on

1 conduct because, when in the course of a representation an
2 attorney is communicating with opposing party, it's --
3 they're doing something as a lawyer. And that's really
4 what we're regulating.

5 The comparison that I'm trying to draw is that it's
6 really the same when you're talking about practicing
7 medicine, that all sorts of medical regulations as to what
8 a provider can or can't do. If you squint, they might be
9 speech regulation because a lot of practicing medicine
10 might be, for example, sitting in the room with a patient
11 and talking to them.

12 THE COURT: What time, place, or manner would
13 this referral be allowed under this particular act?

14 MR. JACOBS: I don't think -- so --

15 THE COURT: Who has to chaperon the doctor to
16 make this referral or who -- under what circumstances
17 would this doctor be allowed to make those statements
18 under your analogy?

19 MR. JACOBS: My analogy is not that the SAFE Act
20 is a time, place, and manner restriction on speech. My
21 point is that the SAFE Act is not a restriction on speech
22 at all. And so with the lawyer example, the way that Your
23 Honor was sort of analyzing it, if you were to think of
24 that lawyer-witness interaction as a speech restriction,
25 then I think it would be -- make it time, place, manner.

1 But I think my point with the lawyer analogy is that
2 that's not a speech restriction at all either.

3 I don't think we really think of it that way. And
4 all sorts of conduct-based regulations on professions are
5 really like that in that, you know, there may be
6 incidental words that a doctor can't say to a patient
7 because they're not allowed to practice medicine in some
8 certain way, whether it's ethics issue, whether it's not
9 being able to recommend a treatment that's prohibited by
10 the FDA. We could think of examples. But I think my
11 larger point is, there is no speech restriction on -- in
12 the referral prohibition.

13 THE COURT: Do you think this act restricts a
14 doctor from talking to a third party about, generally, if
15 I was interested in this, and then that third party who is
16 not a doctor tells the patient? What's the restriction
17 there?

18 MR. JACOBS: The SAFE Act prohibits a referral.
19 And I think "referral" has a specific meaning in the
20 statute as something that a doctor does in the course --
21 course of his medical practice for a patient. So talking
22 to someone else who is not a patient who maybe that person
23 -- I don't think the SAFE Act restricts that.

24 So I think that the restriction is fairly narrow in
25 what it operates against.

1 THE COURT: Verbal advice to a patient to go
2 elsewhere is a referral or not?

3 MR. JACOBS: I think that -- I think if a doctor
4 is counseling a patient and --

5 THE COURT: I'm talking about a different
6 situation. I'm talking about, he's talking to patient's
7 uncle, and patient's uncle tells the patient, here's what
8 I would do if I were you. Is that barred by the Act under
9 your understanding because it's not a referral, it's not
10 me signing something like the torturous process I went
11 through last week on getting an MRI because I didn't go to
12 my primary care physician to make a referral to get this
13 done.

14 So I'm trying to mesh what you consider speech with
15 your definition of referral.

16 MR. JACOBS: I think if it's -- so certainly if
17 it's advice given to the patient -- I know you were asking
18 about the uncle. We'll answer that. If it's advice given
19 to the patient for a medical purpose that's based on the
20 physician's medical judgment, that would be a referral.
21 If it is advice given --

22 THE COURT: It's not a true referral from the
23 receiving doctor that you're talking about? This is
24 advice versus what I consider a technical referral where
25 the receiving doctor looks in his file and says, I was

1 referred by Dylan Jacobs.

2 MR. JACOBS: I think that's the other half of
3 the restriction. So I think that -- you know, if --
4 assume that this doctor doesn't talk to any other doctor
5 and just tells a patient, I think you should go see Dr.
6 X --

7 THE COURT: He can't talk -- the treating
8 physician under this law cannot talk to another doctor
9 about any given particular patient? Is that covered?

10 MR. JACOBS: I think if it constitutes a
11 referral in the sense of, I have this patient, it's my
12 medical judgment that I am referring to you for -- them to
13 you for one of these gender-transition procedures and it's
14 based on the doctor's medical judgment, I think that
15 constitutes a referral under the Act of what we would
16 think of it. So I think there's maybe a patient part of
17 the referral and a coordinating physician part of the
18 referral.

19 If I could address the uncle portion, I guess. I
20 think my answer would be that, if the doctor is using his
21 medical judgment to direct a patient to some medical
22 treatment through an intermediary and the intent is the
23 intermediary is going to tell the patient, I don't think
24 that's any different. I think that's still a referral, if
25 that's the reason why he's doing it. If he's talking with

1 someone at the grocery store and he doesn't have the
2 patient in mind -- and we could get into kind of odd
3 scenarios, but I think that the core of it is using
4 medical judgment to recommend a medical procedure and a
5 provider to provide that procedure.

6 So that's why I think that -- that's why our position
7 is that is a conduct restriction on the practice of
8 medicine rather than something that ought to be conceived
9 as a speech regulation.

10 So based on the evidence the plaintiffs submitted and
11 our legal case, we think we're entitled to judgment as a
12 matter of law. And so we would ask the Court to grant
13 that.

14 THE COURT: You didn't think much of the note.
15 I was more looking at your body language.

16 MR. JACOBS: I was finished. I was finished.
17 I'm still finished. That's my motion. I think we
18 recognize it's probably a formality, but --

19 THE COURT: Fair enough. I was just processing
20 in my head. We had the general treatment ban and then we
21 had the First Amendment ban. Do you think that covers the
22 waterfront on your motion that you want to offer?

23 MR. JACOBS: Yes, Your Honor.

24 THE COURT: Response.

25 MR. STRANGIO: Thank you, Your Honor. Chase

1 Strangio.

2 Plaintiffs oppose defendants motion for judgment as a
3 matter of law. I want to first address that various
4 reasons why heightened or strict scrutiny are triggered,
5 which would then place the burden on the defendants in
6 this case.

7 So as we've briefed extensively and as our evidence
8 has shown, this law discriminates on the basis of sex and
9 transgender status. It discriminates on sex in a up in of
10 different ways. It does so --

11 THE COURT: Let me interrupt you. Part of the
12 argument that Mr. Jacobs conceded is that I'm bound by the
13 panel -- Eighth Circuit panel's ruling on that. So I'm
14 not sure you need to make that argument.

15 MR. STRANGIO: Your Honor, if I could make the
16 argument given that the defendants have moved for
17 rehearing en banc on that particular question and have
18 asked the Eighth Circuit panel to revisit it while --

19 THE COURT: Does your argument to me waive any
20 right you might have to make an argument at the Eighth
21 Circuit for that?

22 MR. STRANGIO: No, Your Honor, but in the event
23 that the Eighth Circuit instructs this court differently,
24 I think there's some -- a few reasons why sex
25 discrimination applies in this case separate and apart

1 from the way in which the Eighth Circuit interpreted it.

2 THE COURT: I guess my point is, for this point
3 in the proceeding, I'm bound to accept your argument.

4 MR. STRANGIO: Fair enough.

5 THE COURT: So I'm not sure you need to make it.
6 I guess.

7 MR. STRANGIO: I'll move on from that.

8 THE COURT: Go ahead if you like to, but I have
9 my marching instructs from Eighth Circuit as to how to use
10 strict scrutiny in the sex gender context, and they align
11 with your wishes I guess.

12 MR. STRANGIO: Yes. Understood. For that
13 reason, we believe that sex discrimination triggers
14 heightened scrutiny as both Your Honor and the Eighth
15 Circuit have found, and separately that the Act, as the
16 evidence has shown, as it's in the plain text also
17 discriminates on the basis of trans status independently
18 triggering heightened scrutiny for that reason.

19 And that can be understood in two ways. And I do
20 want to mention both of them. In the first is that trans
21 status discrimination is inherently sex discrimination as
22 the Supreme Court has held in Bostock. So that's an
23 independent triggering of heightened scrutiny separate
24 from the determination by this Court potentially that
25 trans status itself is a quasi suspect classification.

1 As we've shown in our briefing, we believe that it is.

2 The one point I want to respond to from the
3 defendants' presentation is the question about the
4 immutability. And under the Supreme Court's doctrine in
5 this area, immutability is either something that someone
6 cannot change or something that one should not have to
7 change because it is so fundamental to who they are. I
8 believe that we heard extensive testimony as to that
9 particular aspect of transgender identity, both that it
10 has a biological basis, but also that it is a fundamental
11 core aspect of someone's identity. So that also is a basis
12 on which heightened scrutiny is triggered.

13 I think responding to the fundamental rights and
14 First Amendment arguments, which independently also
15 trigger strict scrutiny in this case, as parents have
16 testified, they have historically made medical decisions
17 for their children. This is not something they would be
18 able to do were this act to go into effect. It infringes
19 upon their right to make those decision, something that
20 the court -- the Supreme Court has long recognized as a
21 fundamental right.

22 With respect to the referral provision, I do want to
23 address that before I move to the rational basis piece of
24 the argument, which I think is also important to address
25 here.

1 There was actually quite specific testimony from
2 Dr. Stambough yesterday that, in light of the current
3 restrictions on the clinic's ability to prescribe
4 treatment to new patients, that they have been having
5 verbal conversations with patients, which constitute
6 speech and are, therefore, after those conversations,
7 instructing patients of where to go to receive the
8 treatment that they are not able to provide. We think
9 this is a clear example of speech that would be infringed
10 based on the content of the speech were the Act to go into
11 effect.

12 So certainly, based on the evidence, Dr. Stambough
13 has standing with respect to these referrals that she
14 would not be able to make. With respect to the question
15 even that I believe Your Honor was asking of defendants of
16 sort of whether this is conduct or speech, even if this
17 were speech incidental to conduct, it would still trigger
18 a heightened level of review, not strict scrutiny, which
19 we think is warranted in light of the fact that this is a
20 content-based restriction on the speech.

21 In other words, a doctor would be able to say -- to
22 say a family, to the Dennises, you can go travel to
23 receive counseling treatment out of state for this
24 condition, but Dr. Stambough would not be able to say, you
25 are able to go see X, Y, or Z provider for endocrine

1 treatment for gender dysphoria. That is a content and a
2 viewpoint-based restriction on speech triggering strict
3 scrutiny.

4 Given that those are the reasons why heightened or
5 strict scrutiny is triggered, it's defendants' burden. We
6 certainly don't think they could meet that burden, but
7 certainly have not at this point in the case met that
8 burden.

9 In any event, even if this Court were to find that no
10 heightened scrutiny applies, we have heard testimony about
11 the various medical procedures that are banned under the
12 Act and that there are many forms of medical care,
13 particularly in pediatrics where there are no randomized
14 control trials for example, where there may be a need for
15 more research and data, where there are potentially some
16 irreversible effects. And yet it is only this care that
17 is singled out by the State of Arkansas for prohibition.
18 In fact, the precise care is permitted, including in
19 context where the purpose of the care is to affirm a
20 patient's gender affirmation, as long as it's not a
21 transgender person that this care is permitted.

22 We think that for this reason plaintiffs have shown
23 through their evidence that this law makes no sense in
24 light of how Arkansas treats other types of care. It
25 imposes in the end a broad and undifferentiated disability

1 on a single class of people without a legitimate basis.
2 And the Supreme Court had repeatedly made clear that that
3 that is impermissible.

4 The harms of this law have been shown to be severe.
5 This Court has heard testimony all week of how this
6 treatment has greatly improved the lives of the individual
7 plaintiffs here in Arkansas and that this is typical of
8 this care. As their parents testified for Dylan, for
9 Parker, for Brooke, and for Sabrina, this care has turned
10 the lights on for them. It has improved their health and
11 well-being. And taking it away would be potentially
12 catastrophic. And as Dylan said, this care has been
13 synonymous with hope.

14 So the harms of this law are clear. We believe that it
15 must be tested under heightened scrutiny which places the
16 burden on the defendants which they certainly have not met
17 at this point, but that under any standard of review this
18 law is unconstitutional.

19 Plaintiffs oppose defendants' motion and respectfully
20 ask that the Court deny it.

21 THE COURT: Motion will be denied at this time.

22 We got a witness on deck?

23 We have a witness on deck?

24 MR. CANTRELL: I believe we do, Your Honor.

25 Just to preview, Your Honor, we anticipate that our first

1 two witnesses at least will involve confidential
2 testimony.

3 THE COURT: Is there any portion of that
4 testimony that we can get out of the way before we dismiss
5 the remainder of the crowd, or not? I don't have a
6 preference. I'm just saying, the last one we did, we did
7 kind of a halfway not privilege, second half privilege
8 situation. Are this -- these facts so intertwined with
9 your entire direct that I need to dismiss everyone now?
10 Your call. You're the only one that knows really.

11 MR. CANTRELL: Yes, Your Honor. So the first
12 witness, I believe it would be appropriate to have all of
13 the testimony with the --

14 THE COURT: Sealed.

15 MR. CANTRELL: -- cleared.

16 The second witness, there is a first portion that
17 would be nonconfidential following by a confidential
18 section of questioning.

19 THE COURT: All right. Then I'm going to ask
20 y'all do the same thing we did last time and look around
21 the room and find out who you're comfortable with, and the
22 remainder of the individuals will be asked to sit outside
23 for this portion or this witness and perhaps a portion of
24 the next.

25 MR. HALPERN: Your Honor, one more quick

1 statement. Aviv Halpern on behalf of the plaintiffs.

2 THE COURT: Come forward to the mic.

3 MR. HALPERN: This witness in particular is also
4 especially sensitive so we'd ask, to the extent possible,
5 to actually further restrict the courtroom as much as
6 possible to just people who are directly -- that on both
7 sides are -- have directly been involved with these
8 records. They're therapist records for a particular
9 plaintiff. So we're going to clear our side in terms of
10 everyone except for that minor plaintiff. But to the
11 extent possible, if there are lawyers in the gallery that
12 have not been directly involved with these records, we'd
13 ask that -- to the extent we could exclude them, we would
14 like to.

15 THE COURT: I'll see what I got left after we do
16 the first thinning.

17 MR. HALPERN: Thanks, Your Honor.

18 [Sealed proceedings under separate cover.]

19 THE COURT: We're going to cycle back to sealed/
20 not sealed on this next witness. How long do you
21 anticipate your direct on this witness?

22 MR. CANTRELL: Not as long as for Ms. Campbell.

23 THE COURT: I didn't pay attention to when we
24 started, Mr. Cantrell. Can you give me a time how long
25 you think you might --

1 MR. CANTRELL: I was hoping to avoid doing that,
2 Your Honor, because --

3 THE COURT: I'm not going to hold you to it. I
4 just want an estimate because we have an hour until lunch
5 roughly.

6 MR. CANTRELL: Your Honor, I will -- so the
7 issue will be that the first part of Ms. Ho's testimony
8 would not -- would not be confidential testimony.

9 THE COURT: How long do you think that will
10 take, the nonconfidential portion of her testimony, on
11 direct?

12 Because here's -- here's the problem. We bring them
13 in and then you're going to have to allow cross in the
14 middle of your examination of this witness on
15 nonconfidential issues unless she goes last. So I've got
16 to bring them in, let them hear your direct, let them hear
17 their cross, and then take them back out and you finish
18 your direct under the sealed portion. That's awkward.

19 MR. CANTRELL: Yes, Your Honor. I will say I
20 believe that we can get through -- I don't know how long
21 counsel's cross would be, but I believe we could get
22 through the nonconfidential portion before lunch.

23 THE COURT: You don't have a problem with them
24 crossing the nonconfidential portion in the middle of your
25 direct, because that's what it's going to take.

1 MR. CANTRELL: However Your Honor believes would
2 be the appropriate way to proceed.

3 THE COURT: I'm asking you how do you want to
4 proceed. What I'm inclined to do is just not let anybody
5 in and open the transcript on this portion, but I've never
6 had a situation where we've had to direct and cross and
7 then direct and cross and then recross, and it's starting
8 to push me, pull me on bringing people in and out.

9 So I'm inclined just to proceed with this witness as
10 if she were sealed, and we can decide what to do with her
11 testimony afterwards so you're direct won't be
12 interrupted.

13 MR. CANTRELL: Your Honor, may I have just a
14 moment to confer with counsel?

15 THE COURT: Sure.

16 MR. CANTRELL: Your Honor, if the
17 nonconfidential portion of Dr. Ho's testimony will be
18 unsealed, then we can -- we can keep the courtroom closed
19 at this moment. We have no objection to that.

20 THE COURT: Okay. That's probably how I'll
21 proceed. I've got to make sure that we clearly demark
22 when we're going from one line to the other. So if you'll
23 give me a heads up saying, that concludes my open portion
24 and is would like to be my closed portion, it would help
25 me on figuring out what to review when I decide what to

1 unseal .

2 MR. CANTRELL: Yes, Your Honor.

3 THE COURT: Let's bring -- is it Dr. Ho?

4 Mrs. Ho?

5 MR. CANTRELL: Defense calls Dr. Stephanie Ho.

6 THE COURT: Okay. Is she in the room? Somebody
7 go get her.

8 Dr. Ho, come on forward. Are you her attorney?

9 MS. BROWNSTEIN: May she take her water up there
10 with her?

11 THE COURT: Sure. Ms. Brownstein, we've been
12 allowing people to use the jury box, if you'd like to
13 listen more closely. If you can hear from back there.
14 I'm not asking you to move. I'm just offering alternate
15 seating.

16 MS. BROWNSTEIN: Okay. Thank you.

17 THE COURT: Do you want to make an appearance so
18 we know who we're talking about?

19 MS. BROWNSTEIN: I can make an appearance as the
20 attorney for Dr. Ho.

21 THE COURT: Who are you?

22 MS. BROWNSTEIN: I'm Bettina Brownstein of the
23 Bettina Brownstein Law Firm. Thank you.

24 MR. CANTRELL: May I proceed, Your Honor?

25 THE COURT: Certainly, Mr. Cantrell.

HO - DIRECT

1 MR. CANTRELL: Good morning.

2 THE COURT: You swear to tell the truth?

3 THE WITNESS: I swear to tell the truth.

4 STEPHANIE HO, DEFENDANTS' WITNESS, DULY SWORN

5 DIRECT EXAMINATION

6 BY MR. CANTRELL:

7 Q. Dr. Ho, my name is Michael Cantrell. I'm with the
8 with the Attorney General's office, and I represent the
9 defense in this case. I believe we've met before during
10 your deposition. So good morning.

11 Can you state your name for the record and spell your
12 last name, please?

13 A. My name is Stephanie Ho, last name is spelled H-o. I
14 use she/her pronouns.

15 THE COURT: What was that last part?

16 THE WITNESS: I use she/her pronouns.

17 THE COURT: Okay.

18 BY MR. CANTRELL:

19 Q. Dr. Ho, you are a family physician, correct?

20 A. That's correct.

21 Q. You are not a pediatrician, correct?

22 A. I'm not a pediatrician.

23 Q. And you've not obtained specialized training in
24 psychiatry. Is that right?

25 A. I'm not a psychiatrist.

1 Q. You've not obtained specialized training in
2 psychology.

3 A. I'm not a psychologist.

4 Q. You've not obtained specialized training in
5 endocrinology, correct?

6 A. I'm not an endocrinologist.

7 Q. You provide cross-sex hormones to patients with
8 gender dysphoria, correct?

9 A. That's correct.

10 Q. By the term gender dysphoria, you mean a discomfort a
11 person has with a certain feature of their body. Is that
12 right?

13 A. That's right.

14 Q. And you do not make use of the Diagnostic and
15 Statistical Manual in your practice, correct?

16 A. The DSM criteria is what I use to determine if
17 somebody has gender dysphoria, those guidelines.

18 Q. Dr. Ho, you also provide cross-sex hormones to
19 patients with gender nonconformity. Is that right?

20 A. That is not correct.

21 Q. Just to -- just so I'm clear, you -- the question
22 that I was asking was, whether you provide cross-sex
23 hormones to patients with gender nonconformity. And you
24 answered, no.

25 A. That's correct.

1 Q. So Dr. Ho, you testified in a deposition in this
2 case. Is that right?

3 A. Yes, sir.

4 Q. And you were under oath during that deposition?

5 A. Yes, sir.

6 Q. And you swore to tell the truth in that deposition,
7 correct?

8 A. That's correct.

9 Q. And did you tell the truth during your deposition?

10 A. I did, but I may have misspoke.

11 Q. And your counsel was present during that deposition,
12 correct?

13 A. That's correct.

14 Q. Dr. Ho, do you recognize this as the -- Dr. Ho, do
15 you recognize this as the nonconfidential portion of the
16 deposition you gave in this case dated April 15, 2022?

17 A. That's correct.

18 Q. And turn to Page 14 of that deposition. And
19 beginning at page -- so Page 14, Line 12, I will read.

20 Question: I think you just answered my next
21 question. My question was going to be, what do you call
22 the gender-related condition for which you prescribe
23 hormones?

24 Answer: I call it gender nonconformity.

25 A. That's correct.

1 Q. I read that correctly?

2 A. Correct.

3 Q. Dr. Ho, by gender nonconformity, you mean that a
4 person does not identify with the gender they were
5 assigned at birth, correct?

6 A. That's correct.

7 Q. And you've provided cross-sex hormones to minors for
8 around five years. Is that right?

9 A. That's correct, roughly.

10 Q. Your goal in prescribing cross-sex hormones is to
11 help the patient feel affirmed in their gender identity,
12 correct?

13 A. Correct.

14 Q. And the goals of treatment are sometimes set by the
15 patient, correct?

16 A. All care is individualized.

17 Q. And so by saying all care is individualized, you mean
18 that -- that sometimes the goals of treatment are set by
19 the individual patients, correct?

20 A. The goals of the patient are included in the
21 individualized therapy that's provided.

22 Q. You provide cross-sex hormones to patients on an
23 informed consent basis.

24 A. That's correct.

25 Q. And that differs from the treatment model used at the

1 Arkansas Children's Hospital Gender Spectrum Clinic,
2 correct?

3 A. I don't know what guidelines they have.

4 Q. Are you familiar with the Arkansas Children's
5 Hospital Gender Spectrum Clinic?

6 A. I'm aware of it, yes.

7 Q. What is your understanding of the difference between
8 your informed consent-based treatment and what the Gender
9 Spectrum Clinic does?

10 A. So it's my understanding that the Gender Spectrum
11 Clinic requires a psychological evaluation prior to
12 initiation of hormone therapy. My clinic is informed
13 consent-based, which means that the patient and the parent
14 are provided all information that is appropriate and
15 important for them to make an informed decision.

16 Q. So you don't typically require patients seeking
17 cross-sex hormones to meet with a psychologist before
18 getting a prescription, correct?

19 A. I don't technically make them meet with a mental
20 health provider, correct.

21 Q. And there's no standard period of time that a patient
22 has to wait to receive cross-sex hormones, correct?

23 A. Correct.

24 Q. You're aware that even experts in trans care provide
25 different answers to questions about best practices in

1 trans care.

2 A. I don't know what other providers would say. I can't
3 speak to that.

4 Q. Are you aware that -- that different clinics have
5 different protocols for providing cross-sex hormones?

6 A. I understand that that is the -- yes, I'm aware.

7 Q. Are you aware that differences in practices across
8 clinics are due in part to a general lack of research
9 supporting rules for prescribing cross-sex hormones?

10 A. I don't understand your question.

11 Q. Dr. Ho, you used the TransLine Prescriber Guidelines
12 in your practice, correct?

13 A. Correct.

14 Q. And you trust the TransLine guidelines to provide
15 reliable information, correct?

16 A. I do.

17 Q. Are you aware that those guidelines state that even
18 experts in trans care provide different answers to
19 questions about best practices?

20 A. I don't recall reading that line specifically.

21 MR. CANTRELL: One moment.

22 THE COURT: Let me short cut. Do you agree or
23 disagree with that statement?

24 MS. COOPER: Your Honor, if I may object. This
25 seems to be going into expert testimony, not fact witness

1 testimony about her practices.

2 THE COURT: I think he's asking does she think
3 care providers can disagree is how I heard the question.
4 But I'm not sure that takes an expert to answer that
5 question.

6 But what was your question, Mr. Cantrell, so I don't
7 misstate or mischaracterizes your question?

8 R. CANTRELL: So the question goes to the fact
9 that Dr. Ho --

10 THE COURT: I just want you to restate your
11 question so I can know what to deal with.

12 MR. CANTRELL: Yes, Your Honor.

13 BY MR. CANTRELL:

14 Q. The question was, you're aware that those guidelines
15 state that even experts in trans care provide different
16 answers to questions about best practices.

17 THE COURT: If she can answer that question, I'm
18 going to allow it.

19 THE WITNESS: I'm aware that different practices
20 provide individualized care based on their assessments of
21 their patients.

22 BY MR. CANTRELL:

23 Q. Are you aware that the TransLine guidelines -- let me
24 back up.

25 You've testified that the TransLine guidelines are

1 reliable, correct?

2 A. The TransLine guidelines are the guidelines I use
3 because I find them evidence based and appropriate to
4 apply to my practice.

5 Q. You trust them to provide reliable information.

6 A. I do.

7 Q. And you're aware that those guidelines state that
8 differences in practice are result of a general lack of
9 research supporting rules for prescribing cross-sex
10 hormones.

11 A. I'm generally aware of that statement, yes.

12 Q. Are you aware that many of the suggestions in the
13 TransLine Prescriber Guidelines are based on low-level
14 evidence in nontransgender population.

15 A. I'm aware.

16 Q. You're aware that many of the suggestions in
17 TransLine Prescriber Guidelines are not based on hard
18 evidence.

19 A. Can you repeat the question?

20 MS. COOPER: Object on vagueness.

21 THE COURT: Which guidelines are you talking
22 about, Mr. Cantrell? You can't just say some guidelines.
23 You need to be more specific.

24 MR. CANTRELL: Thank you, Your Honor.

25 MS. COOPER: Your Honor, just to -- for

HO - DIRECT

1 clarification, my objection on vagueness was to the
2 language "hard evidence."

3 THE COURT: Was to?

4 MS. COOPER: "Hard evidence."

5 THE COURT: "Hard evidence"? I'm sorry. I
6 can't hear you and I can't see you.

7 MS. COOPER: My objection on vagueness was to
8 his reference to hard evidence, the term "hard evidence."

9 THE COURT: Maybe that too but I -- I have no
10 idea how big these guidelines are, but the notion that
11 some of them and some of them might not be X, Y, or Z hard
12 evidence or otherwise was my problem with the question.
13 I've got to understand question so I can understand the
14 answer. I appreciate the focus on hard evidence, but I
15 didn't even get there yet so.

16 I understand she says she relies on these guidelines,
17 Mr. Cantrell, but I need you to get to what portion of the
18 guidelines you think are salable with regard to these
19 patients because, as mentioned before, she's not an
20 expert. She's here to testify about her treatment of
21 these particular patients.

22 MR. CANTRELL: Yes, Your Honor. I will -- I'll
23 just move on. That was my last question on that that
24 topic.

25 BY MR. CANTRELL:

HO - DIRECT

1 Q. Although I will ask not specifically about those
2 guidelines, but in the way that you use the guidelines.
3 So you don't use the TransLine guidelines to treat any
4 condition other than gender dysphoria and gender
5 nonconformity, correct?

6 A. I use those guidelines to treat gender dysphoria.

7 Q. Dr. Ho, your goal in prescribing cross-sex hormones
8 to a patient is for patient to feel affirmed in their
9 gender identity, correct?

10 A. That's correct.

11 Q. And you -- you're basing care more on your patient's
12 experience and satisfaction as opposed to objective lab
13 results, correct?

14 A. I base my care and provide for a level of affirmation
15 as opposed to a specific lab value or -- or things like
16 that. I treat the patient, not the lab.

17 Q. And so I -- as I understand it, the answer to my
18 question would be yes. Is that right?

19 A. Can you repeated the question?

20 MS. COOPER: Objection. Vague.

21 BY MR. CANTRELL:

22 Q. Yes. So the question, your goal is in prescribing
23 cross-sex hormones in a patient is for patients to feel --
24 I'm sorry. That was not the question.

25 You're basing care more on your patient's experience

1 and satisfaction as opposed to objective lab results,
2 correct?

3 A. Correct.

4 Q. Cross-sex hormones are sometimes referred to as
5 hormone replacement therapy.

6 A. That's correct.

7 Q. But hormone replacement therapy was traditionally
8 something used to treat post-menopausal women, correct?

9 A. Correct.

10 Q. When used in adolescents with gender dysphoria, a
11 cross-sex hormone is not replacing any hormone, correct?

12 A. That's correct.

13 Q. You agree that cross-sex hormones could cause your
14 patients long-term effects that are unknown at the present
15 time.

16 A. I agree.

17 Q. And you tell your patients that cross-sex hormones
18 can cause infertility, correct?

19 A. Correct.

20 Q. Not many of your patients pursue fertility
21 preservation, correct?

22 A. That's correct.

23 Q. Have you treated any patients for gender dysphoria
24 since -- I'm sorry.

25 Have you received any new patients presenting with

HO - DIRECT

1 gender dysphoria since February of this year?

2 A. Yes.

3 Q. Have you -- have you received any referrals from any
4 other person in Arkansas?

5 A. Yes.

6 Q. Since February of this year?

7 A. Yes.

8 Q. Have any of those referrals come from the Gender
9 Spectrum Clinic?

10 A. Yes.

11 Q. How many of those have come from Gender Spectrum
12 Clinic?

13 A. Maybe three to five.

14 MR. CANTRELL: If I can have a moment, Your
15 Honor.

16 THE COURT: Sure.

17 BY MR. CANTRELL:

18 Q. Dr. Ho, how many patients have you treated with
19 cross-sex hormones during your career?

20 A. Do you mean adults or adolescents?

21 Q. Let's stick to adolescents. And specifically let me
22 be clear. Let's stick to those under age 18.

23 A. Okay. I'm not great at estimation, but I would say
24 maybe around 20.

25 Q. And how many patients do you currently treat? How

HO - CROSS

1 many -- how many patients under age 18 do you currently
2 treat with cross-sex hormones?

3 A. Maybe between 30 to 40.

4 MR. CANTRELL: Pass the witness.

5 THE COURT: Mr. Cantrell, unless you need that
6 at your desk, you can leave that up there until we're
7 done, unless you need it to take notes.

8 MR. CANTRELL: I will -- I will take some of
9 them.

10 THE COURT: Okay.

11 CROSS-EXAMINATION

12 BY MS. COOPER:

13 Q. Good morning, Dr. Ho. I'm Leslie Cooper for the
14 plaintiffs.

15 THE COURT: Ms. Cooper, hang on a second. Let
16 him get a seat and then we'll continue.

17 MS. COOPER: Sure.

18 THE COURT: Go ahead.

19 MS. COOPER: Thank you.

20 BY MS. COOPER:

21 Q. Dr. Ho, just want to clarify something you were just
22 asked. You were asked how many patients who were under 18
23 have you treated with hormone therapy. And I believe you
24 said you estimated around 20. Is that correct?

25 Well, let me followup where the confusion was,

1 because then you asked, how many patients you currently
2 treat. And I'm not sure if it was specified whether the
3 question was about minors or minors and adults. You said
4 30 to 40.

5 So can you help clarify that?

6 A. I guess I didn't understand if I was speaking before
7 February like I was asked prior or if I'm speaking in
8 total.

9 Q. Okay. And prior to February, approximately how many
10 adolescents -- patients under 18 did you treat with
11 hormone therapy?

12 A. Approximately 20.

13 Q. And you then you mentioned you were referred from
14 adolescents or under 18 patients by the Arkansas
15 Children's Hospital gender clinic. Is that correct?

16 A. They have made referrals, yes.

17 Q. I believe you said that was about three to five. Was
18 that right?

19 A. Yes.

20 Q. And so the number 30 to 40 that you were referencing,
21 was that adult patients?

22 A. No. That is referrals from outside providers and
23 people who have sought care on their own.

24 Q. Understood. Since the change in the protocols at the
25 Arkansas Children's hospital?

1 A. Correct.

2 Q. You testified that you would provide gender-affirming
3 hormone therapy to patients with gender dysphoria. You
4 also used the term, gender nonconformity. I want to ask
5 you if you wanted to explain something about the use of
6 that term? It sounded like you were beginning to.

7 A. Yes. So gender nonconformity is basically a person's
8 -- who does not identify with the sex they were assigned
9 at birth. Not all people who are gender nonconfirming
10 have gender dysphoria, and so hormone therapy is indicated
11 for gender dysphoria.

12 Q. And Mr. Cantrell pointed to your testimony about use
13 of treatment hormone therapy for conditions relating to
14 gender issues, and I believe pointed to testimony where
15 you said, gender nonconformity. Can you explain that
16 testimony?

17 A. Yes. I believe that I misspoke. Gender
18 nonconformity and gender dysphoria sometimes in common
19 language and discussion are accidentally used in
20 interchangeably. But my intention was to say gender
21 dysphoria.

22 Q. With your minor patients with gender dysphoria, is it
23 correct that each patient's mental health is evaluated in
24 some way prior to prescribing hormones in your practice?

25 A. Yes.

1 Q. Is that done by using screening tools for depression
2 and anxiety?

3 A. That's correct.

4 Q. Does that include talking to the patient?

5 A. Absolutely.

6 Q. Does that include talking to their parent?

7 A. Yes.

8 Q. And is it correct that you inform minor parents and
9 their patients [sic] of the potential risks of treatment
10 before initiating hormone therapy?

11 A. Correct.

12 Q. And that includes, I believe you testified, telling
13 them about potential risks of infertility?

14 A. Correct.

15 Q. Is that all part of the informed consent process to
16 make them aware of the potential risks and benefits of
17 care?

18 A. Correct.

19 Q. You provide this information to families in verbal
20 and written forms.

21 A. Absolutely.

22 Q. And with minors, you determine a patient's capacity
23 to make an informed decision through talking with the
24 patient and their parent. Is that correct?

25 A. Correct. And an overall general assessment of the

1 patient -- patient's care and taking all of that into
2 consideration before I would decide to prescribe.

3 Q. And you do not prescribe puberty blockers as
4 gender-affirming care, do you?

5 A. No.

6 Q. And going back to the number of patients for whom you
7 -- minor patients that you treated for gender dysphoria,
8 that number that you gave prior to February of '22 that it
9 was a total of 20 patients, does that go back to 2017;
10 from 2017 to February of '22 you saw about 20 underage 18
11 patients for and provided hormone therapy?

12 A. That's correct.

13 Q. And just a couple of more questions, Dr. Ho.

14 You diagnosed Sabrina Jennen with gender dysphoria
15 before initiating hormone therapy.

16 A. Correct.

17 Q. And you regularly see Sabrina to monitor her hormone
18 therapy?

19 A. That's correct.

20 Q. Is hormone therapy benefiting Sabrina?

21 A. Yes.

22 MS. COOPER: Just a moment, Your Honor.

23 Nothing further, Your Honor.

24 MR. CANTRELL: Your Honor, before I proceed, I
25 just want to make clear that this is the nonconfidential

HO - REDIRECT

1 portion and we've had direct and cross and this is
2 redirect and we will have a subsequent portion during
3 which we have confidential testimony.

4 THE COURT: So you're saying we're starting the
5 sealed portion of this proceedings?

6 MR. CANTRELL: Not at this time. Not yet, but
7 soon. I will let you know.

8 THE COURT: So this is your redirect on the
9 nonsealed portion?

10 MR. CANTRELL: Yes.

11 THE COURT: Okay.

12 REDIRECT EXAMINATION

13 BY MR. CANTRELL:

14 Q. Dr. Ho, can you can you explain the 30 to 40 figure
15 again for my benefit? When you give the 30 to 40 person
16 figure, what does that represent?

17 A. The 30 to 40 figure represents all of the patients
18 that I see under the age of 18 for gender-affirming care.

19 Q. Okay. And that is currently?

20 A. That's currently.

21 Q. Okay.

22 MR. CANTRELL: May I have a moment, Your Honor?

23 THE COURT: You may.

24 MR. CANTRELL: Nothing further at this time for
25 the open portion, Your Honor.

1 THE COURT: You can move to the closed portion
2 then.

3 [Sealed proceedings under separate cover.]

4 THE COURT: You're off your subpoena. Free to
5 go.

6 THE WITNESS: Thank you. What do I do with --

7 THE COURT: Just leave it there. Thank you,
8 Dr. Ho.

9 Have a good day, Bettina.

10 MS. BROWNSTEIN: Thank you, Your Honor.

11 THE COURT: Mr. Cantrell, can you give me an
12 estimate on how long -- in light of these last two
13 witnesses, how long you think your third and final witness
14 is going to go? I am considering going straight through
15 rather than everyone have to wait for us.

16 MR. CANTRELL: Yes, Your Honor. I'll defer to
17 co-counsel.

18 MS. TEMPLIN: Your Honor, this will be
19 relatively short, although we'll need a moment to pull out
20 a couple of exhibits.

21 THE COURT: Why don't we go ahead and do that.
22 We're going swap out court reporters while you do that.
23 We'll just work straight through.

24 Is there any sealed portion of this next witness we
25 need to worry about?

1 MS. TEMPLIN: Nothing like those, Your Honor. I
2 may end up referring as -- to use as impeachment material
3 some exhibit --

4 THE COURT: My point is, do I need to exclude
5 the rest of the audience from this next witness?

6 MS. TEMPLIN: No, Your Honor.

7 THE COURT: Perfect. Thank you. You let them
8 know we're going to go ahead.

9 (At recess was taken at 12:01 p.m.)

10 * * * * *

11 REPORTER'S CERTIFICATE

12 I, Valarie D. Flora, FCRR, TX-CSR, AR-CCR, certify
13 that the foregoing is a correct transcript of proceedings
14 in the above-entitled matter.

15 Dated this the 26th day of October, 2022.

16 /s/ Valarie D. Flora, FCRR

17 -----

18 United States Court Reporter

19

20

21

22

23

24

25

1 (Proceedings continuing in open court at 12:07 PM.)

2 MS. TEMPLIN: Your Honor, the State calls Dr. Janet
3 Cathey to the stand.

4 **JANET CATHEY, DEFENDANTS' WITNESS, DULY SWORN**

5 MR. SHULTS: Good afternoon, Your Honor. I'm Steve
6 Shults with the Shults Law Firm in Little Rock. We represent
7 Dr. Cathey and I'm here in case I need to object to any
8 questions that might ask for privileged information or might
9 ask for opinion because Dr. Cathey is here as a subpoenaed fact
10 witness, not as an expert witness.

11 THE COURT: Understood. You can sit wherever you
12 can hear the best. The jury box is open to you or if you can
13 hear fine from any other available seat, you're free to take
14 your choice.

15 MR. SHULTS: Thank you, Your Honor.

16 BY MS. TEMPLIN:

17 Q Good afternoon, Dr. Cathey. Could you introduce yourself
18 to the Court and spell your last name for the court reporter?

19 A I'm Dr. Janet Cathey. C-a-t-h-e-y.

20 Q Dr. Cathey, what type of medicine do you practice?

21 A I'm board certified in obstetrics and gynecology.

22 Q When did you graduate from medical school?

23 A I graduated from medical school at UAMS in 1982. I did
24 my residency in OB/GYN at UAMS and finished in 1986.

25 Q Just to clarify, have you had any formal training in

1 pediatrics?

2 A Just as what we do as part of our residency, studying
3 women's health.

4 Q What about in psychiatry or psychology?

5 A No formal training, just years of doing it.

6 Q Where do you currently practice?

7 A I'm at Planned Parenthood.

8 Q Did you see transgender patients before you went to
9 Planned Parenthood?

10 A Yes, I've seen transgender patients almost from the start
11 of my practice 40 years ago.

12 Q What is your current role at Planned Parenthood?

13 A At Planned Parenthood, I'm a clinician. I'm also
14 director of transgender health for Planned Parenthood Great
15 Plains.

16 Q Do you prescribe puberty blockers?

17 A No.

18 Q Have you ever throughout your history prescribed puberty
19 blockers before Planned Parenthood?

20 A No.

21 Q Do you prescribe feminizing hormone therapy?

22 A Yes.

23 Q Do you prescribe masculinizing hormone therapy?

24 A Yes.

25 Q Have you ever prescribed hormone therapy to a minor?

1 A Yes.

2 Q What's the youngest patient you've prescribed hormone
3 therapy to?

4 A When I was on faculty at UAMS, 14.

5 Q Just to clarify, have you prescribed hormone therapy to a
6 minor while working for Planned Parenthood?

7 A Yes. At Planned Parenthood, we'll see 16 and 17 year
8 olds.

9 Q About how many have you seen at Planned Parenthood?

10 A It is not -- I do not have the exact numbers. It is not
11 a significant part of the transgender population that we see.

12 Q Has the number of patients you've seen increased since
13 the gender spectrum clinic declined to take new patients who
14 are minors?

15 A No, we have not seen an increase.

16 Q Have you received any referrals from that clinic or from
17 any other provider in Arkansas?

18 A Not to my knowledge, no.

19 Q Other than you, does anyone else at Planned Parenthood
20 prescribe hormones?

21 A Yes. We have two APNs that also prescribe hormones.

22 Q Do the Planned Parenthood guidelines allow you to
23 prescribe hormones to minors?

24 A Yes, with parental consent.

25 Q Is there a minimum age?

1 A 16.

2 Q Just to clarify, is there any reason why you would
3 prescribe to someone younger than 16?

4 A We would not at Planned Parenthood.

5 MS. TEMPLIN: Your Honor, I'd like to refer her
6 briefly to a document that was designated confidential during
7 depositions. I don't believe it's been sealed in this
8 proceeding but wanted to raise it with you before using the
9 document now.

10 THE COURT: Can you show it to me?

11 MS. TEMPLIN: I can.

12 THE COURT: Y'all know what she's talking about?

13 MS. COOPER: Yes, Your Honor.

14 THE COURT: Is there any objection?

15 MS. COOPER: Can you specify to make sure we're on
16 the same page?

17 MS. TEMPLIN: This is Exhibit 62.

18 THE COURT: This is indicated as Cathey Bates No.
19 333. You want to look at it, Mr. Shults?

20 MR. SHULTS: Yes, please, Your Honor.

21 MS. COOPER: We understand. I believe that --

22 THE COURT: I'm not sure why it's marked
23 confidential, but y'all may have a purpose for having marked it
24 that way.

25 MS. COOPER: I believe it was marked confidential by

1 Dr. Cathey's counsel.

2 THE COURT: Are you talking about just that page or
3 more than that page?

4 MS. TEMPLIN: I just plan to use that page, Your
5 Honor.

6 MR. SHULTS: Your Honor, we also represent Planned
7 Parenthood Great Plains, Dr. Cathey's employer, and I believe
8 that's from guidelines used by Planned Parenthood Great Plains
9 and frankly I don't remember all about the sensitivity of it or
10 reason it was marked confidential, but if it can be received
11 under seal that would be appropriate I think.

12 THE COURT: I'm going to allow her to question this
13 witness. I don't know if I received that document in total or
14 not, but if I do actually receive the exhibit, it will be
15 received under seal and I guess we can go on a question by
16 question basis whether or not you want her to answer in the
17 open to questions posed to her right now.

18 MR. SHULTS: I think that's fine for her to testify
19 in response to questions, and if I have any objection to a
20 particular question, I'll make that objection, Your Honor.
21 Thank you.

22 THE COURT: You may proceed. Does she have a copy?

23 MS. TEMPLIN: To clarify, Your Honor, I just plan to
24 ask one question about this as impeachment, not to offer it
25 into evidence.

1 THE COURT: Okay. To orient it correctly, you may
2 need to pull it -- I'm not sure you can --

3 MS. TEMPLIN: I believe you're right, Your Honor.

4 BY MS. TEMPLIN:

5 Q Dr. Cathey, can you see this page clearly?

6 A Yes.

7 Q At the bottom of the page, Roman numeral II, it reads:
8 Must obtain waiver from PPFA to provide minor's age under 16
9 years. Did I read that correctly?

10 A Yes.

11 Q Does that indicate that Planned Parenthood guidelines
12 allow some patients to obtain hormone therapy if they're under
13 16 years old with a waiver?

14 A With a waiver, these guidelines are for all of Planned
15 Parenthood throughout the country. So our -- we would not get
16 a waiver at -- I wouldn't ask for a waiver.

17 Q So just to clarify, your particular office --

18 THE COURT: Doctor, I think the question is: Does
19 paragraph 2 insinuate that you treat people at Planned
20 Parenthood under 16?

21 THE WITNESS: No, not at Planned Parenthood Great
22 Plains.

23 THE COURT: Is that your question?

24 MS. TEMPLIN: That is. I just wanted to clarify
25 whether Planned Parenthood Great Plains followed the Planned

1 Parenthood Federation of America standard or did not treat
2 patients under 16 with a waiver. And I believe your testimony
3 is that you would not see anyone under 16?

4 THE WITNESS: We wouldn't. Our particular
5 affiliate, we wouldn't ask for a waiver.

6 BY MS. TEMPLIN:

7 Q Okay. Dr. Cathey, what diagnosis would you give your
8 transgender patients?

9 A Usually it's going to be a diagnosis of gender dysphoria.

10 Q Do you require a gender dysphoria diagnosis before you
11 prescribe hormones?

12 A Yes, I would.

13 Q Dr. Cathey, were you deposed in this case?

14 A Yes.

15 Q Was your lawyer present at your deposition?

16 A Yes.

17 Q Did you swear to tell the truth?

18 A Yes.

19 Q Did you tell the truth?

20 A Yes.

21 Q Is this a copy of your deposition, the nonconfidential
22 portion?

23 A Yes. I have no reason to think it's not.

24 Q Is yours not on?

25 A Yes, it's on.

1 Q Sorry. Turning to page 22, starting at line 16, reading
2 the question. "Sure. So let me try to do better. Do you --
3 do you require that someone have a diagnosis of gender
4 dysphoria or endocrine disorder unspecified before you will
5 prescribe the pharmaceutical products for a gender identity
6 related condition?" Turning to the next page. Starting on
7 line 2. "Not -- I would say the majority of the time, majority
8 of the time, they are going to carry one of those diagnoses.
9 There are people that -- you used the word gender
10 nonconforming -- that are not particularly dysphoric, but it is
11 their desire to be placed on hormone management."

12 Did I read that correctly?

13 A You read it correctly.

14 Q To clarify, are there some people who are gender
15 nonconforming who do not formally have gender dysphoria but
16 want to be placed on hormone management who you would prescribe
17 hormones to?

18 MS. COOPER: Objection, mischaracterizing.

19 THE COURT: Doctor, you can answer the question if
20 you understand it.

21 BY MS. TEMPLIN:

22 Q I can read the next couple lines of this deposition.
23 Starting on line 8, another question. "Okay. And there are
24 circumstances when you will prescribe hormones, for example, to
25 those patients?" Line 11. Answer: "Yes."

1 Is that correct?

2 A That's what it says. But this was -- as I look back on
3 this, it is confusing because we're getting into diagnosis
4 codes and then the word "gender nonconformity" comes in here,
5 and there's also the question of when you start asking a
6 physician have you ever, would you ever, those are sometimes
7 difficult questions. So looking at that, thinking about that,
8 I would say no, I wouldn't. I would not treat someone for a
9 condition that they did not have, a diagnosis they did not
10 have.

11 Q Just to confirm, you testified today that you have never
12 prescribed hormones to someone without a formal gender
13 dysphoria diagnosis?

14 A Yes, I would stick with that.

15 Q Do you require your patients to participate in therapy or
16 to get a mental health diagnosis before they receive hormone
17 therapy?

18 A No. We use an informed consent model.

19 Q When a patient comes in to your office, will you
20 prescribe hormones on the first visit?

21 A I would under certain conditions. It's not going to be
22 someone who walks in and says I want hormones and they get
23 hormones. That would be mischaracterization.

24 Q You testified just now that you obtained consent before
25 prescribing hormone therapy?

1 A Yes.

2 Q How do you understand consent?

3 A Now, are we talking about minors or are we talking about
4 all patients?

5 Q Let's focus on minors for now.

6 A Minors are going to have to have parental consent.

7 Q Do you personally obtain that consent?

8 A Do I? Am I the one that watches them sign the piece of
9 paper?

10 Q Correct.

11 A No.

12 Q Who is it who obtains the consent on the piece of paper?

13 A The medical assistant has them sign the consent.

14 Q So the process is having them sign a consent form, right?

15 A The physical process, yeah.

16 Q Do those assistants have medical training?

17 A They are -- they have a type of vocational training.
18 They're not licensed.

19 Q So they do not have a nursing or a medical degree?

20 A No, but I go over that consent with them.

21 Q How long do they talk with each patient?

22 A Probably 15 or 20 minutes.

23 Q Is this 20-minute discussion only about informed consent
24 or are there other things they're doing during this time?

25 A There's other things.

1 Q For example, which things?

2 A They talk to them about their medical history, they get
3 their vital signs, they just ask them what they're in for, just
4 a general pre-physician, pre-provider discussion.

5 MS. TEMPLIN: Your Honor, may I approach?

6 THE COURT: Sure.

7 BY MS. TEMPLIN:

8 Q Dr. Cathey, do you recognize this first form?

9 A Yes.

10 Q What is it?

11 A That's the Planned Parenthood -- the first is consent for
12 feminizing hormones.

13 Q Is this your form, the form your office uses?

14 A It's what we use now.

15 Q Is this form an accurate representation of what your
16 office tells patients seeking hormone therapy?

17 A Yes.

18 Q Does Planned Parenthood keep this form on record as part
19 of its regular business practice?

20 A Yes.

21 MS. TEMPLIN: Your Honor, I'd like to offer Exhibit
22 59 into evidence under the business record exception.

23 MS. COOPER: Objection, Your Honor. This is a
24 consent form. It is not the foundation that this is something
25 kept in ordinary business practices.

1 THE COURT: Well --

2 MS. TEMPLIN: Your Honor, Dr. Cathey just testified
3 they do keep this as part of their record and this court has
4 admitted other consent forms under the business record
5 exception during the testimony of Dr. Hutchison.

6 MS. COOPER: Your Honor, if I may add, it seems this
7 exhibit is a collection of various forms, it's not just one.

8 THE COURT: I guess that's my question. I'm looking
9 at --

10 MS. TEMPLIN: Your Honor, we would be happy to --

11 THE COURT: Please let me finish. I'm looking at a
12 40-page document, and similar to what I asked Mr. Cantrell,
13 what is the relevant portion of this document that you want
14 considered?

15 MS. TEMPLIN: Your Honor, I was just about to answer
16 that. We would be happy to admit the first two forms, one for
17 masculinizing hormone therapy, one for feminizing hormone
18 therapy, and if this court did not want to admit --

19 THE COURT: That would be Bates numbers what?

20 MS. TEMPLIN: Apologies, let me pull it up. Bates
21 numbers 360 through 367.

22 MS. COOPER: Your Honor, if I may, I believe this is
23 a blank form. And I understand they keep these records when
24 forms are signed. This is not a signed consent form. And in
25 addition, the exhibit they submitted was a -- this is part of a

1 larger exhibit. I don't think it's appropriate to then just
2 take a portion now of an exhibit. This was an exhibit that --

3 THE COURT: Mr. Cooper, I asked them to do that
4 because they narrowed 30 pages from this record that she
5 doesn't think are necessarily relevant, so if you want to offer
6 the rest of it, you can, if you think it's somehow relevant in
7 your cross. But the notion that they didn't supply the entire
8 document is because the entire document in their estimation
9 isn't relevant. So I'm not going to sustain it on that basis.
10 I am going to ask Dr. Cathey, I know these are forms, but is
11 this the form you have your clients sign to obtain informed
12 consent?

13 THE WITNESS: This 360 through 367 are what we
14 currently use at Planned Parenthood to obtain consent.

15 THE COURT: What's your other objection, Ms. Cooper?

16 MS. COOPER: Your Honor, again, the business records
17 are records that are kept in the course of business, and when
18 it's a document with a patient's signature, that's the record
19 that's kept. I don't understand the blank forms to be part of
20 that.

21 THE COURT: Overruled, and I'll receive 59, Bates
22 stamps Cathey 360 to 367. Is that the right numbers?

23 MS. TEMPLIN: It is, Your Honor. Thank you.

24 THE COURT: All right.

25 (Defendants' Exhibit 59 received in evidence.)

1 BY MS. TEMPLIN:

2 Q Dr. Cathey, let's start with page 360. What form is
3 this?

4 A This is the consent for feminizing hormone therapy.

5 Q At the bottom under what are the risks, this form notes
6 that estrogen can harm the liver, increase the amount of fat
7 and/or cholesterol in the blood, increase the risk of heart
8 disease, increase the risk of blood clots in the legs, lungs or
9 brain, stroke, increase blood pressure, increase the risk of
10 diabetes, sugar, increase the risk of gallbladder problems,
11 cause migraine headaches, cause pituitary tumors, tumor of
12 small gland in the brain which makes prolactin. Is that an
13 accurate representation of what your assistant will advise
14 clients during those 15 minutes?

15 A I'm the one who's going to advise them of those risks,
16 and those risks are extremely small.

17 Q To clarify then, do patients sign a consent form before
18 they have discussed the risks with you?

19 A Yes, just physically as far as the flow of traffic so to
20 speak, that's the way, yes.

21 Q So let me briefly --

22 A But they're not going to leave without me talking about
23 this.

24 Q So let me briefly ask you about what you discuss with
25 them. How long do patients spend with you?

1 A Probably anywhere from 40 minutes to an hour.

2 Q Is the bulk of that time spent discussing the consent
3 form or are there other things that you're discussing with them
4 as well?

5 A No, there's a lot of things we're discussing.

6 Q What other things?

7 A They're going to come in, I'm going to get a medical
8 history, past medical history, past surgical history, just talk
9 to them about, you know, what are you here for today, tell me
10 about why, you know, what your earliest memories are
11 identifying as the opposite gender, you know, and patients
12 usually have very compelling stories about this. Go through
13 them just the process of going through puberty, what it was
14 like, and what their goals are for therapy, and you know, what
15 their long term goals are, just talk to them and get a general
16 conversation with them.

17 Q So breaking down that 40 to 60 minutes, about how much of
18 that period do you think you spend discussing the information
19 in the consent forms versus these many other important things
20 to discuss with the patients?

21 A I don't think that's a question I can answer because
22 every patient has different parts of that that are more
23 important and specific to that patient.

24 Q Okay. So just to look at a couple other pages in this
25 consent form. On page 362, the heading, "Can I Get Someone

1 Pregnant?" Reads: "No one can tell you for sure if you'll be
2 able to cause a pregnancy after taking feminizing hormone
3 therapy. You could cause a pregnancy or you may never be able
4 to even if you stop the medicines."

5 Is this something that you discuss with patients?

6 A Yes.

7 Q Flipping to page 364. What is this form?

8 A This is the consent for masculinizing therapy. Again, at
9 the bottom of the page under the heading, "What are the risks?"

10 Reads: "Testosterone can increase your red blood cell count,
11 increase the amount of fat and/or cholesterol in the blood,
12 increase the chance of getting diabetes, sugar, harm the liver,
13 rare."

14 Are these risks that you discuss with your patients?

15 A Yes.

16 Q On the next page, the bottom bullet-pointed list, I won't
17 read the whole thing, but the sentence above it reads: "Some
18 of the changes will probably not go away even if you stop
19 taking testosterone."

20 Is this something you mention to your patients?

21 A Yes.

22 Q Flipping the page one last time, on page 366, the top
23 paragraph under "Can I get pregnant? No one can tell you for
24 sure if taking testosterone will affect your ability to get
25 pregnant. You could get pregnant or you may never be able to

1 get pregnant in the future even if you stop the testosterone."

2 Is this something that you mention to your patients?

3 A Yes.

4 Q At this point when you prescribe treatment, is there a
5 criteria that you use to determine which treatment is
6 appropriate for the patient?

7 A A criteria like a checklist or?

8 Q A diagnostic criteria like a checklist.

9 A The decision to make whether a patient is going to go on
10 hormone therapy or not is a determination that I make based
11 upon my assessment of whether they can understand the risks,
12 the benefits, how to take the therapy, whether they have
13 reasonable goals, whether I think they can cognitively and are
14 mature enough to make these decisions.

15 Q Would you prescribe someone whatever treatment they would
16 prefer and ask you for as opposed to selecting between
17 different options?

18 A We're usually going to have a standard that we start
19 with. I'm the one who decides the therapy. The patient, I'm
20 going to take -- that's kind of part of their goals of therapy,
21 you know, when they tell me what their goals are.

22 MS. TEMPLIN: Your Honor, I would like to just use
23 one other piece of the confidential exhibit. Should I show you
24 this page also and Dr. Cathey's attorney?

25 THE COURT: I would start with Dr. Cathey's attorney

1 and move to Ms. Cooper and then I'll probably not need to be
2 consulted after that point.

3 MS. TEMPLIN: I believe Dr. Cathey's attorney has
4 okayed using this.

5 THE COURT: How about Ms. Cooper?

6 MS. TEMPLIN: Okay.

7 BY MS. TEMPLIN:

8 Q Dr. Cathey, can you read this page?

9 A Yes.

10 Q The first paragraph says, "Keep in mind they probably
11 already know what you are going to tell them about hormone
12 therapy and they already have in mind what they want to be
13 prescribed."

14 To clarify, do you understand that patients already know
15 what they want to be prescribed and you will prescribe them
16 what they already want?

17 A No. That's totally out of context.

18 THE COURT: What's the objection?

19 MS. COOPER: The objection is I believe this is a
20 different document than the document that we were looking at
21 before. Can we clarify that, please, and establish foundation?

22 MS. TEMPLIN: I apologize. This is Exhibit 61.

23 THE COURT: So is that the document you showed
24 Mr. Shults?

25 MS. TEMPLIN: This is the document I showed both

1 attorneys. This is in document 61. And I should ask Dr.
2 Cathey. What is this slide from?

3 THE WITNESS: This is a page from a PowerPoint I
4 gave to providers within Planned Parenthood. This is a
5 statement. It's just like an intro on the PowerPoint and I
6 would say that and then I would say, but it is your decision on
7 how to manage these patients. Patients come in and those are
8 their goals and this is what as a provider you can expect from
9 patients, but that's not what you're going to do.

10 BY MS. TEMPLIN:

11 Q Do you set the dosage amount, the length of therapy, or
12 is that also individualized based on the patient's goals?

13 A It's individualized based on what I think is the best
14 medical practice for that patient.

15 Q So based on their goals, what you think --

16 A Their goals are part of it.

17 MS. TEMPLIN: Can I have a moment, Your Honor?

18 BY MS. TEMPLIN:

19 Q Dr. Cathey, I just wanted to ask one follow-up question
20 on the 16 or under treatment issue. Is it your testimony that
21 Planned Parenthood Great Plains would not treat anyone under 16
22 or that it would not request the waiver to treat those under
23 16?

24 A I really don't know how to clarify that more. If any
25 Planned Parenthood affiliate, be it Little Rock, New York,

1 Florida, if they were going to treat someone under 16, they
2 have to get a waiver.

3 Q So if --

4 A And that comes from Planned Parenthood.

5 Q So if someone from Planned Parenthood gave someone under
6 16 a waiver and they came to Planned Parenthood Great Plains,
7 would Planned Parenthood Great Plains treat them?

8 A No. I would request a waiver that I wanted to treat
9 someone that was 15 so the patient doesn't request the waiver,
10 the provider. Is that what you're asking me?

11 Q I'm just trying to clarify whether there is another way
12 to get the waiver and you --

13 A No, the waiver comes through the provider.

14 Q Also one more clarifying question. Once again, is your
15 testimony that you have not treated anyone under 16 or that you
16 would not treat anyone under 16?

17 THE COURT: While at Planned Parenthood?

18 BY MS. TEMPLIN:

19 Q At Planned Parenthood Great Plains. Yes.

20 Thank you, Your Honor.

21 A I have not and because we've always had the Children's
22 clinic available, there's not been a need to treat anyone under
23 16. I don't think I would.

24 Q You don't think you would?

25 A No.

1 MS. TEMPLIN: Pass the witness, Your Honor.

2 CROSS-EXAMINATION

3 BY MS. COOPER:

4 Q Hi, Dr. Cathey. My name is Leslie Cooper. I'm with
5 Plaintiffs' counsel. I just have a few questions for you
6 today. When you were asked about the number of 16 and 17 year
7 olds you treated with hormone therapy at Planned Parenthood,
8 you said you weren't sure of the amount and that it wasn't very
9 much, I believe. When you testified at your deposition, you
10 said it was probably less than six visits a year since 2018.
11 Does that sound about right?

12 A Yes.

13 Q Is that because --

14 A And I had said in the deposition, I said this would be a
15 guess.

16 Q That's because once Arkansas Children's Hospital's gender
17 clinic was developed, that's where everyone sent kids. Is that
18 right?

19 A Yes.

20 Q When was the last time you provided gender-affirming
21 hormone therapy to somebody under 18?

22 A In June of 2021.

23 Q At your deposition, you were asked about your -- sorry,
24 about your evaluation of 16 and 17-year-old patients prior to
25 providing gender-affirming hormone therapy. I want to show you

1 a portion of that.

2 THE COURT: Ms. Cooper, if it's easier, you can move
3 to that and treat it like a podium and use that screen so
4 you're not --

5 MS. COOPER: I'm just making sure it's on.

6 BY MS. COOPER:

7 Q I have up page 38 of your deposition. If you could go
8 down to line 12, midway down on the page. Are you with me?

9 A Yes.

10 Q If you would read along with me. "Well, once I see the
11 patient, these are usually extended visits, probably 40 minute
12 visits on the average. Do you want to know specific questions
13 I ask them or how a visit goes generally? I ask questions
14 about their medical history, their gender identity, you know,
15 why they -- why they think they have gender dysphoria, you
16 know, how this identity has played out through puberty. Why
17 they feel like now they want to be on hormone therapy. What do
18 they expect from hormone therapy. What their ultimate goals
19 would be. During that time, I have time to assess their
20 maturity, their cognition, you know, the parental interaction
21 between the parent and child. So there's a lot of things we're
22 looking at. And the questions are not always the same
23 obviously. A lot of the 16 or 17 year olds that come in have
24 already seen mental health providers and that's how they got to
25 us."

1 Is that your testimony?

2 A Yes.

3 Q You testified, I believe, that you don't require patients
4 to see a mental health provider; is that correct?

5 A That's correct.

6 Q But seeing a mental health provider is always encouraged?

7 A Yes.

8 Q And one of the services that Planned Parenthood offers is
9 making appointments or contacts with mental health providers?

10 A Yes.

11 MS. COOPER: No further questions.

12 MS. TEMPLIN: No redirect, Your Honor.

13 THE COURT: Can we excuse this witness from her
14 subpoena?

15 MS. TEMPLIN: Yes, Your Honor.

16 THE COURT: All right. Dr. Cathey, you're free to
17 go.

18 MR. SHULTS: Thank you, Your Honor.

19 THE COURT: Thank you, Mr. Shults. Does that
20 conclude our festivities for the day?

21 MS. COOPER: Your Honor, I just have one also
22 housekeeping matter. We've invoked the rule to keep witnesses
23 sequestered during the course of the trial. Sorry, of course,
24 nonparty witnesses. That was implied, sorry about that. And I
25 just want to get clarification that that would mean that any

1 transcripts rough or final ones become available may not be
 2 provided to the remaining witnesses who have not yet testified
 3 or that they be made publicly available where those witnesses
 4 could access them.

5 THE COURT: Yes. It would defeat the purpose if
 6 they could read as opposed to just hearing it, so yes. If
 7 they're going to be called as a witness, you shouldn't -- they
 8 shouldn't be able to be present in court, read transcripts from
 9 court or be told what the testimony of other witnesses were
 10 while they were not here while they're under the rule, so my
 11 understanding of the spirit of that rule would include what
 12 you're discussing.

13 MS. COOPER: Thank you, Your Honor.

14 THE COURT: Anything else for the good of the cause?

15 MR. JACOBS: That's all the witnesses from us today,
 16 Your Honor.

17 THE COURT: See y'all on the 28th.

18 (Recess at 12:45 PM.)

19 REPORTER'S CERTIFICATE

20 I certify that the foregoing is a correct transcript of
 21 proceedings in the above-entitled matter.

22
 23 /s/ Karen Dellinger, RDR, CRR, CCR

24 -----
 United States Court Reporter

Date: October 27, 2022