

Chair Lee, Vice Chair Cleary, and Committee members:

The American Civil Liberties Union of North Dakota strongly opposes HB 1254.

By categorically banning all medical care for minors related to “gender transition”, HB 1254 discriminates based on transgender status and sex in violation of the United States Constitution and likewise violates the rights of parents under the Due Process Clause.

This bill represents vast government overreach into the doctor-patient and parent-child relationship. When Arkansas passed similar legislation, Governor Hutchinson vetoed the bill. He explained that such a sweeping ban on care created “new standards of legislative interference with physicians and parents” and “puts the state as the definitive oracle of medical care, overriding parents, patients and healthcare experts,” which “would be—and is—a vast government overreach.”¹ Governor Hutchinson further noted that “denying best practice medical care to transgender youth can lead to significant harm to the young person—from suicidal tendencies and social isolation to increased drug use.”² The Arkansas General Assembly ignored Governor Hutchinson’s warnings and overrode his veto. However, the law was enjoined in federal court before it could take effect and remains enjoined.³

By singling out medical care related to gender transition for unique prohibition, HB 1254 violates the United States Constitution.

Where a law singles out people based on the fact that they have a gender identity that does not match the sex assigned to them at birth and therefore undergo “gender transition”, it necessarily discriminates on the basis of sex and trans status, thus triggering heightened equal protection scrutiny under the Constitution. “[I]t is impossible to discriminate against a person for being ... transgender without discriminating against that individual based on sex.”⁴ As the U.S. Supreme Court has explained, “[a]ll gender-based classifications today warrant heightened scrutiny.”⁵ There is no exception to heightened scrutiny for gender discrimination based on physiological or biological sex-based characteristics.⁶ This bill, if passed, would separately trigger heightened scrutiny for discriminating against individuals based on transgender status.

Parties who seek to defend gender-based and trans status-based government action must demonstrate an “exceedingly persuasive justification” for that action.” Under this standard, “the burden of justification is demanding and it rests entirely on the State.”⁷ The North Dakota legislature’s only purported justification for the bill is

¹ “Governor Asa Hutchinson Holds Pen and Pad Session with Local Media,” April 5, 2021, at 9:16, 9:30 <https://www.youtube.com/watch?v=9Jt7PxWkVbE.9:30>.

² *Id.* at 8:58.

³ See *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2021 WL 3292057 (E.D. Ark. Aug. 2, 2021)(enjoining Arkansas ban on gender-affirming care for transgender minors and finding plaintiffs likely to succeed on merits of their equal protection, due process and First Amendment claims).

⁴ *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1741, — L.Ed.2d — (2020).

⁵ *United States v. Virginia*, 518 U.S. 515, 555 (1996).

⁶ See *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 70, 73 (2001).

⁷ *Virginia*, 518 U.S. at 531.

that the banned care could cause hypothetical future problems. But under heightened scrutiny, justifications “must be genuine, not hypothesized or invented post hoc in response to litigation.”⁸ This demanding standard leaves no room for a state to hypothesize harm and impose a categorical ban on medical treatment that is supported by every major medical association in the United States.

The only court to consider a challenge over a law like the one proposed here concluded, based on an extensive record, that “[g]ender-affirming treatment is supported by medical evidence that has been subject to rigorous study. Every major expert medical association recognizes that gender-affirming care for transgender minors may be medically appropriate and necessary to improve the physical and mental health of transgender people.”⁹ The Court went on to identify the many harms that would flow from allowing a law like the one proposed here to go into effect:

The Act will cause irreparable physical and psychological harms to the Patient Plaintiffs by terminating their access to necessary medical treatment. Plaintiffs who have begun puberty blocking hormones will be forced to stop the treatments which will cause them to undergo endogenous puberty. Plaintiffs who will soon enter puberty will lose access to puberty blockers. In each case, Patient Plaintiffs will have to live with physical characteristics that do not conform to their gender identity, putting them at high risk of gender dysphoria and lifelong physical and emotional pain. Parent Plaintiffs face the irreparable harm of having to watch their children experience physical and emotional pain or of uprooting their families to move to another state where their children can receive medically necessary treatment. Physician Plaintiffs face the irreparable harm of choosing between breaking the law and providing appropriate guidance and interventions for their transgender patients.¹⁰

The Court ultimately held that the law failed heightened scrutiny and would fail any level of constitutional review.¹¹ The Arkansas court’s well-supported and reasoned analysis applies here.

Likewise, if passed, HB 1254 would violate the fundamental rights of parents to direct the custody and care of their minor children. “The liberty interest...of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests” recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). [Bill] bars treatment in cases where the treatment is recommended by physicians and supported by parents and their minor children. Such an intrusion into the medical decision-making of parent infringes their Due Process rights. Particularly here with such clear science showing that withholding care to transgender young people can be deadly, the law would seriously infringe the rights of parents to not only guide the care of their children but also keep their children alive and well. As the Arkansas court held in *Brandt* about Arkansas’s

⁸ *Id.* at 533.

⁹ *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2021 WL 3292057, at *4 (E.D. Ark. Aug. 2, 2021)

¹⁰ *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2021 WL 3292057, at *5 (E.D. Ark. Aug. 2, 2021)

¹¹ *Id.*



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comparable law, “Parent Plaintiffs have a fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary. So long as a parent adequately cares for his or her children, “there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.”¹²

If passed, HB 1254 could set off a public health crisis for transgender youth and their families and open the door to other governmental intrusion into the doctor-patient relationship. This bill violates the United States Constitution and harms transgender youth and their families, all to solve a problem that plainly does not exist. Transgender young people, their parents and their doctors are in the best position to decide the appropriate course of medical treatment for each minor patient. The state’s unprecedented intrusion into these complex dynamics and decisions will cause grave harm. For these reasons, we urge this committee’s “do not pass” recommendation.

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¹² *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2021 WL 3292057, at *5 (E.D. Ark. Aug. 2, 2021)(citing *Troxel*, 530 U.S. at 68-69, 120 S.Ct. 2054).