

No. 23-2681

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

DYLAN BRANDT, *ET AL.*,
Plaintiffs-Appellees,

v.

TIM GRIFFIN, *ET AL.*,
Defendants-Appellants.

**Appeal from the United States District Court
for the Eastern District of Arkansas**

**BRIEF OF THE HUMAN RIGHTS CAMPAIGN FOUNDATION
AS AMICUS CURIAE
SUPPORTING PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Amicus Human Rights Campaign Foundation (“HRC Foundation”) has no parent corporation and there is no publicly held corporation owning 10% or more of its stock.

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US LGBTQ Spending Surpasses 1.4 Trillion Dollars in 2021—

According to the Pride Co-op, NASDAQ (Mar. 28, 2022, 4:41 PM),

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INTEREST OF AMICUS CURIAE¹

Amicus Human Rights Campaign Foundation (“HRC Foundation”) is the educational arm of the Human Rights Campaign, America’s largest civil rights organization working to achieve equality for LGBTQ+ people. Through its programs and publications, including its Corporate Equality Index (“CEI”), the nation’s benchmarking tool on corporate policies, practices, and benefits pertinent to LGBTQ+ employees, the HRC Foundation seeks to make transformational change in the everyday lives of LGBTQ+ people, shedding light on inequity and deepening the public’s understanding of LGBTQ+ issues, including advancing transgender justice.

INTRODUCTION

In addition to its core constitutional infirmities, Act 626 imposes detrimental collateral consequences upon families and businesses in the State of Arkansas. The plaintiffs have ably proven—and the district court found as a matter of fact—that Act 626 will have devastating

¹ No party’s counsel authored this brief in whole or in part and no party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than Amicus, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

consequences on the Act's direct targets: transgender Arkansans and their families. Bad as they are, Act 626's harms do not stop there. Rather, the discriminatory law will create ripple effects that radiate beyond transgender Arkansans, stigmatizing the larger LGBTQ+ community and hurting residents and companies in the state. In other words, apart from Act 626's most immediate problems, it is also simply bad for families and businesses.

Survey data confirms that over 80% of LGBTQ+ people and around 90% of transgender or non-binary people feel that gender-affirming care bans like Act 626 exacerbate “harmful stereotypes, discrimination, hate, and stigma against the LGBTQ+ community.” Human Rights Campaign Foundation, Impact of Gender Affirming Care Bans on LGBTQ+ Adults 2 (last updated Aug. 15, 2023), *available at* <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/GAC-Ban-Memo-Final.pdf>; *id.* (the majority of transgender and non-binary adults and a plurality of LGBTQ+ adults report that bans like Act 626 directly impact their own or their loved ones' physical or mental health).

Unsurprisingly, 94% of transgender or non-binary adults and nearly 80% of LGBTQ+ adults report that bans on gender-affirming care

make them feel less safe. Id. Likewise, local health care providers report that in light of Act 626, “patients feel as if society is trying to erase them, trying to make it as if they don’t even exist.” Rebeka Hall Scott, ‘Kids feel like they are being erased’: Inside the clinic targeted by Arkansas’s new anti-trans law, Arkansas Nonprofit News Network (June 9, 2021), <https://arknews.org/index.php/2021/06/09/kids-feel-like-theyre-being-erased-inside-the-clinic-targeted-by-arkansass-new-anti-trans-law/>.

As one resident put it: “We love it here. We love Arkansas; we just want Arkansas to love us back.” Tess Vrbin, Arkansas families describe living where lawmakers are hostile to their transgender children, Arkansas Advocate (May 3, 2023), <https://arkansasadvocate.com/2023/05/03/arkansas-families-describe-living-where-lawmakers-are-hostile-to-their-transgender-children/>.

Amicus respectfully urges this Court to examine the consequences of discrimination on Arkansas families and the Arkansas economy, as described below. These effects are legally relevant and consistent with the Supreme Court’s recognition that that anti-LGBTQ+ laws can impose discrimination and harm beyond the laws’ direct targets. *See, e.g.,*

Obergefell v. Hodges, 576 U.S. 644, 668 (2015) (discussing marriage ban’s stigmatizing impact on children of couples prevented from marrying).

ARGUMENT

I. Act 626 would burden Arkansas families and force many to move out of state.

Act 626 puts Arkansas families with transgender children in a terrible position: either forgo medically necessary care for their children, threatening their health and safety, or leave their jobs, homes, friends, and extended families to move to another state that does not impose a ban on medically necessary healthcare. Recent survey data and the history of LGBTQ+ migration in America underscore this basic dynamic.²

² Act 626 directly targets transgender youth, but gender-affirming-care bans like Act 626 threaten all LGBTQ+ people. That is why over half (52.7%) of transgender or non-binary adults nationwide would move—or already have moved—from a state that banned gender-affirming care. Human Rights Campaign Foundation, Impact of Gender Affirming Care Bans on LGBTQ+ Adults 3 (last updated Aug. 15, 2023). And over 70% of transgender and non-binary adults living in states that had already banned gender transition care at the time of the survey wanted to move to a new state, or had already taken steps to do so. *Id.* at 4. Over a quarter (28.3%) of all LGBTQ+ adults—not just transgender adults—indicate that they too would look to relocate if their state banned gender-affirming care. *Id.* Anti-LGBTQ+ state laws of all kinds have historically prompted people to cross state borders. See Miriam Marcén and Marina Morales, The Effect of Same-Sex Marriage Legalization on Interstate Migration in The United States 12 (Dec. 22, 2019) (finding a robust “response of homosexual migration to same-sex marriage regulation”); Abbie E.

This is obviously deleterious and disruptive to individuals and families in a number of personal and practical ways. In particular, Act 626 risks pulling families apart, since one parent or family member may have to uproot their lives and move to another state while another cannot yet, for a number of reasons including job security, economic barriers, and obligations to other family members.

Forcing such impossible tradeoffs upon families would undermine family support networks as well as the stability of the home. As the district court found, Act 626 forces Arkansas families like the Brandts, Jennens, Saxtons, and Dennises to confront the difficult decision of whether to relocate outside of Arkansas. The district court's findings of fact illustrate how Act 626 makes life in Arkansas untenable for many families: Sabrina Jennen's father testified that "if Act 626 went into effect, they would either move or travel out of state to get treatment."

App. 259; R. Doc. 283 at 28. The Saxtons "concluded that they'd 'have to

Goldberg, Impact of HB 1557 (Florida's Don't Say Gay Bill) on LGBTQ+ Parents in Florida, Williams Institute (Jan. 2023), <https://williamsinstitute.law.ucla.edu/publications/impact-dont-say-gay-parents/> (noting that more than half of parents surveyed considered moving out of the state); Jose Soto, Searching for Safety: When Anti-LGBTQ+ State Laws Force Families to Move, Equality 19, 19–21 (Fall 2023).

pick up and leave” if Act 626 barred Parker from receiving his hormone therapy. App. 261; R. Doc. 283 at 30. Dylan Brandt and his mother “discussed moving out of state or traveling out of state regularly for treatment.” App. 256; R. Doc. 283 at 25. And the Dennis family similarly concluded that they “would need to regularly travel out of state or move out of state to get Brooke care.” App. 263; R. Doc. 283 at 32.

Bans like Act 626 also impact extended families—grandparents, aunts, uncles, cousins, and so on—and the communities that displaced families leave behind. Family support systems and stable home environments are valuable for all families. *See Obergefell*, 576 U.S. at 668 (discussing the importance of “stability” and “predictability” of family structures and the discriminatory effects if children are denied those benefits because of a relative’s LGBTQ+ identity). But Act 626 risks upending these extended family supports, to the detriment of children and all family members involved.

II. Act 626 harms Arkansas businesses and the state economy.

Another destructive consequence of Act 626 involves the Arkansas economy. Overall, stigmatizing LGBTQ+ people and their families—including by preventing children from accessing medically necessary

care—causes economic dislocation, impedes competition, and undermines equality in the workplace.

First, pushing LGBTQ+ families to leave the state—or deterring them from taking a job in Arkansas in the first place—naturally has economic consequences. Recent survey data demonstrates over a quarter (28.3%) of LGBTQ+ adults said they would relocate to a job in a different state if their state were to enact a gender-affirming-care ban like Act 626. Human Rights Campaign Foundation, Impact of Gender Affirming Care Bans on LGBTQ+ Adults 4 (last updated Aug. 15, 2023). With 76,000 working-age LGBTQ+ people in the State of Arkansas, and many more who are working parents of LGBTQ+ youth, the business community would face considerable costs to replace those who relocate. *See generally* Level Playing Field Inst., The Cost of Employee Turnover Due Solely to Unfairness in the Workplace 4 (2007) (estimating American businesses lose upwards of \$64 billion annually losing and replacing workers who leave due to discrimination).

In turn, this will make it harder for companies to recruit and retain LGBTQ+ employees and employees who are the parents of LGBTQ+ youth in the future to fill key positions. *See generally* Katie Navarra, The

Real Costs of Recruitment, Society for Human Resource Management (Apr. 11, 2022) (“[T]he total cost to hire a new employee can be three to four times the position’s salary.”).

Second, Act 626 risks making Arkansas less competitive and prompting many consumers to make hard decisions about where to buy certain products and services. LGBTQ+ families and individuals constitute a vital and growing class of consumers and command \$1.4 trillion in spending power nationally, with household-income averages approximately double the national average. See US LGBTQ Spending Surpasses 1.4 Trillion Dollars in 2021—According to the Pride Co-op, NASDAQ (Mar. 28, 2022, 4:41 PM), https://www.nasdaq.com/press-release/us-lgbtq-spending-surpasses-1.4-trillion-dollars-in-2021-according-to-the-pride-co-op#google_vignette.

By stigmatizing LGBTQ+ persons, pushing them to move out of state, and deterring them from moving to or visiting the state in the first place, Arkansas stands to lose out on considerable revenue. To make matters worse, these losses will only grow over time. As policies in the United States have generally become more accepting of LGBTQ+ people over the past decades, the community has grown significantly.

In fact, the LGBTQ+ community is one of the fastest-growing segments of the population, especially in younger generations. Id. According to 2021 Census Bureau data, while LGBTQ+ people currently constitute about 7.1% of the American public, they make up 10.5% of Millennials and 21%—more than one in five—of Gen Z. Id. Arkansas is poised to lose out on the economic potential of this growing consumer class if and when LGBTQ+ people and their loved ones take their money elsewhere. See Jay H. Bryson & Nicole Cervi, The “Secret Sauce”: The LGBTQ+ Community & State and Economic Growth Rates, Wells Fargo (June 1, 2023), <https://wellsfargo.bluematrix.com/links2/html/09715269-77b0-4c34-a1fc-9181b8ae131e> (“[S]tates with higher concentrations of people who identify as [LGBTQ+] had higher rates of GSP [gross state product] growth over the past decade, everything else equal.”).

Third, Act 626 hurts employers and equality in the workplace in interrelated ways. An established body of business studies and empirical research shows that companies that welcome and include LGBTQ+ employees are more innovative and competitive.³ For example, the HRC

³ See, e.g., Feng Li & Venky Nagar, Diversity and Performance, 59 *Mgmt. Sci.* 529, 531 (2013); Sylvia Ann Hewlett, et al., How Diversity Can Drive Innovation, *Harv. Bus. Rev.* (Dec. 2013) (finding that diversity “unlocks

Foundation’s Corporate Equality Index (“CEI”)—a benchmarking tool measuring companies based on LGBTQ+ non-discrimination policies, benefits, and other inclusive practices—reveals “a significant positive relationship between the CEI score and . . . firms’ levels of innovation, which ultimately positively affect firm performance.” Mohammed

innovation by creating an environment where ‘outside the box’ ideas are heard”); Sylvia Ann Hewlett, et al., Innovation, Diversity and Market Growth 4 (2013) (“[A]n inherently diverse workforce can be a potent source of innovation, as diverse individuals are better attuned to the unmet needs of consumers or clients like themselves.”); *id.* at 6 (finding “a robust correlation between highly innovative, diverse companies and market growth”); Forbes Insights, Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce, 19 (2011) (“[T]he best way to ensure the development of new ideas is through a diverse and inclusive workforce.”); Credit Suisse, Credit Suisse ESG Research, LGBT: the Value of Diversity 1 (Apr. 2016) (finding that 270 companies that openly support and embrace LGBTQ+ employees outperformed and had returns on equity and cash flow that were 10% to 21% higher); M. V. Lee Badgett et al., The Business Impact of LGBT-Supportive Workplace Policies, Williams Institute 23 (May 2013) (finding that the “more robust a company’s LGBTQ+-friendly policies, the better its stock performed over the course of four years (2002–2006), compared to other companies in the same industry over the same period of time”); Shaun Pichler, et al., Do LGBT-Supportive Corporate Policies Enhance Firm Performance? 29 (2017) (“[F]irms with LGBT-supportive policies benefit on key factors of financial performance, which, in turn, increase the investor perception of the firm.”).

Hossain, et al., Do LGBT Workplace Diversity Policies Create Value for Firms?, 167 J. Business Ethics 1, 4 (2020).

In other words, businesses benefit from employing the growing LGBTQ+ community. *See Id.* at 3. As a result, “companies that are more diverse and inclusive are better able to compete.” *Id.* at 7. *See also* Human Rights Campaign Foundation, Corporate Equality Index 2023–2024—Rating Workplaces on Lesbian, Gay, Bisexual, Transgender and Queer Equality (Nov. 2023), https://reports.hrc.org/corporate-equality-index-2023?_ga=2.136458358.777145294.1702327854-1039594282.1702327854.

By making LGBTQ+ residents and their families feel stigmatized and imperiled in the State of Arkansas, and impairing retention and recruiting, Act 626 will undermine equality and innovation in the workplace. *See, e.g.*, Jennifer L. Pomeranz, Challenging and Preventing Policies That Prohibit Local Civil Rights Protections for Lesbian, Gay, Bisexual, Transgender, and Queer People, 108 Am. J. Pub. Health 67, 68 (2018) (discrimination is invariably “economically harmful because it reduces the employee talent pool, decreases innovation, and burdens those stigmatized” (cleaned up)). In summation, Amicus respectfully

urges this Court to consider the various ways in which Act 626 would cause tangible economic consequences for companies and markets in Arkansas in addition to the direct harms caused to transgender youth and their families.

CONCLUSION

Act 626 is not only unconstitutional, but its deprivation of medically necessary care for Arkansas youth also imposes a dangerous stigma on LGBTQ+ people that will make it hard for them and their families to live and work in the state. All of this also comes at a significant cost to Arkansas businesses and the state's economy. Accordingly, this Court should affirm.

Date: December 14, 2023

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 29(a)(5). This brief contains 2,325 words, including all headings, footnotes, and quotations, and excluding the parts exempted under Rule 32(f).

2. In addition, this brief complies with the typeface and type-style requirements of Rule 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Century Schoolbook font.

/s/ Steven J. Alagna

CERTIFICATE OF SERVICE

I certify that on December 14, 2023, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

/s/ Steven J. Alagna