No. __________

In The
Supreme Court of the United States

DR. MAGNI HAMSO, in her official capacity as the Medical Director of the Idaho Division of Medicaid and individually,
Petitioner,

v.

M.H. AND T.B.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether a policy declining coverage for sex-reassignment surgeries violates the Equal Protection Clause; and

2. Whether clearly established law as of July 2022 held that a policy declining coverage for sex-reassignment surgeries violates the Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioner Dr. Magni Hamso, in her official capacity as the Medical Director of the Idaho Division of Medicaid and individually, was a defendant in the district court and appellant in the Ninth Circuit.

Respondents M.H. and T.B. are natural persons proceeding pseudonymously who were plaintiffs in the district court and appellees in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- United States Court of Appeals for the Ninth Circuit, No. 23-35485, *M.H. v. Hamso*, memorandum decision filed September 6, 2024.
- United States District Court for the District of Idaho, No. 1:22-cv-00409-REP, *M.H. v. Jeppesen*, memorandum decision and order denying motion to dismiss in part, signed June 20, 2023.

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PETITION FOR WRIT OF CERTIORARI

The day before this petition was filed, this Court heard more than two hours of oral argument in *United States v. Skrmetti*, No. 23-477. But according to the Ninth Circuit, that argument was entirely unnecessary—only a "plainly incompetent" official would have any doubt as to whether the statute in *Skrmetti* violated the Equal Protection Clause. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011).

That is the inescapable upshot of the Ninth Circuit's qualified immunity decision in this case. This case asks whether failing to provide Medicaid coverage for sex-reassignment surgery discriminates on the basis of sex or transgender status and thus violates the Equal Protection Clause—a question nearly indistinguishable from the one in *Skrmetti*. This question has split five circuits and was worthy of certiorari review, yet the Ninth Circuit determined that *every reasonable official* in July 2022 would have known Idaho's alleged Medicaid policy was unconstitutional based on a "'robust consensus' of district court opinions" that supposedly existed at the time. App.5a–6a.

Because this question will likely be answered by *Skrmetti*, Petitioner asks the Court to hold this petition until *Skrmetti* is decided. The Court should then vacate the Ninth Circuit's ruling on the first prong of the qualified immunity analysis—i.e., its ruling that the alleged policy is unconstitutional.

Further, even if *Skrmetti* does not undermine the Ninth Circuit's ruling on the first prong, its ruling on the second prong is proved erroneous by *Skrmetti*'s

mere existence: no rights are "clearly established" when they are the subject of a 3-2 circuit split and this Court has to grant certiorari to decide whether they exist.

With its contrary decision, the Ninth Circuit continues its long tradition of flouting this Court's qualified immunity precedents—a tradition for which this Court has repeatedly criticized it by name. As the Court has repeatedly done before, it should correct the Ninth Circuit's obvious error via summary reversal.

OPINIONS BELOW

The Ninth Circuit's September 6, 2024, memorandum decision affirming in part and reversing in part the district court's decision is not reported, but is available at 2024 WL 4100235. The district court's June 20, 2023, decision denying the Petitioner's motion to dismiss on grounds including qualified immunity is reported at 677 F. Supp. 3d 1175 (D. Idaho 2023).

JURISDICTION

The Ninth Circuit entered judgment on September 6, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(1)–(4). The circuit court had jurisdiction on interlocutory appeal from the denial of a motion to dismiss based on qualified immunity as of right. *See*, *e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (citing 28 U.S.C. § 1291).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondents M.H. and T.B. are biological males who sought coverage for sex-reassignment surgeries through Idaho Medicaid to treat their gender dysphoria. App.72a, 74a–76a, 83a, 85a. M.H.—20 years old at the time—submitted the request in March 2021. App.72a, 76a. It was initially denied, that denial was reversed through an administrative appeal, and the request then remained pending indefinitely. App.76a, 80a, 83a. T.B.—18 years old at the time—submitted a request for a sex-reassignment surgery in May 2022, which likewise remained pending until after this lawsuit began. App.85a, 89a.[1]

In September 2022, M.H. and T.B. sued Petitioner Dr. Magni Hamso in her official capacity as the Medical Director for Idaho Medicaid and in her personal capacity, along with another Idaho official in his official capacity and an Idaho agency. App.51a. The complaint characterized Idaho Medicaid's non-responses as denials of coverage, and alleged that Idaho Medicaid had a statewide "policy

[1] In 2024, the Idaho Legislature enacted H.B. 668, which excludes the procedures sought by M.H. and T.B. from Medicaid coverage as of July 1, 2024. 2024 Idaho Sess. Laws 744. M.H. and T.B.'s requests were formally denied shortly after that date.

of refusing to authorize" coverage for "gender-affirming surgery for the treatment of gender dysphoria." App.93a. One of the claims in the complaint asserted that the alleged policy violates the Equal Protection Clause by discriminating on the basis of sex and transgender status. App.92a.

Petitioner and her co-defendants promptly moved to dismiss the Equal Protection claim. In so doing, Petitioner asserted a defense of qualified immunity, which precludes claims for money damages against government officials based on alleged violations of rights that are not "clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012).

The district court declined to dismiss on qualified immunity grounds. It first concluded that the alleged Medicaid policy facially discriminated on the basis of sex and was therefore subject to heightened scrutiny, leaving the application of heightened scrutiny for a later phase of the case. App.29a–37a. The district court did not explain how an alleged policy deciding coverage based purely on the patient's diagnosis—without reference to the patient's sex—classifies on the basis of sex.

As for whether the asserted right was clearly established by existing law, the only Equal Protection cases the district court cited involved racial discrimination by cities and law enforcement, which the court said made "the non-discrimination principle [] so clear." App.42a (cleaned up). The court recognized the "nuance to Plaintiffs' Equal Protection claim," as well as "the absence of caselaw specifically confronting" those nuances. App.43a. But it still decided not to resolve the purely legal issue of

qualified immunity "at this stage." App.43a; *but see Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (qualified immunity should be "resolved at the earliest possible stage of a litigation").

Petitioner appealed the qualified immunity denial to the Ninth Circuit, and the Ninth Circuit affirmed in a short, unpublished memorandum disposition. App.4a–6a.[2]

Like the district court, the Ninth Circuit's Equal Protection analysis addressed only the level of scrutiny. It concluded that heightened scrutiny applied, reasoning that the alleged policy declining to cover sex-reassignment surgeries "creates a *classification* on the basis of transgender status and sex" because it "exclusively *burdens* transgender beneficiaries." App.5a (emphases added). To distinguish this Court's holding in *Geduldig v. Aiello* that an insurance-coverage exclusion is *not* subject to heightened scrutiny for exclusively burdening one sex, 417 U.S. 484, 496 n.20 (1974), the Ninth Circuit dubiously declared that "no sex was comparatively disadvantaged" by the pregnancy-specific insurance exclusion at issue in *Geduldig*. App.5a.

[2] Petitioner also appealed the denial of the motion to dismiss as "directly implicated" by her qualified immunity appeal, *see Hartman v. Moore*, 547 U.S. 250, 257 n.5 (2006), but the Ninth Circuit determined it lacked jurisdiction to review the motion to dismiss denial. App.4a. That holding is not at issue in this petition.

The Ninth Circuit's holding that Petitioner has qualified immunity from the plaintiffs' Due Process claim is also not at issue in this petition. App.6a.

The Ninth Circuit also held that the relevant Equal Protection law was clearly established. Its support for that conclusion consisted solely of (1) a race-discrimination case stating generally that "the Equal Protection Clause's non-discrimination principle is so clear," and (2) "a robust consensus of *district court* decisions" evaluating similar insurance policies denying coverage for sex-reassignment surgeries. App.5a–6a (cleaned up) (emphasis added). The Ninth Circuit's "consensus" includes a case that *rejected* the Ninth Circuit's position, *see Lange v. Houston Cnty.*, 499 F. Supp. 3d 1258, 1275–76 (M.D. Ga. 2020), and excludes numerous contrary decisions issued immediately after the events of the complaint—including the admittedly "similar" Sixth Circuit decision currently on review in this Court in *United States v. Skrmetti*. App.4a–6a & n.2.

REASONS FOR GRANTING THE WRIT

This case presents the question whether denying Medicaid coverage for sex-reassignment surgeries violates the Equal Protection Clause. This Court has already granted certiorari in *United States v. Skrmetti*, No. 23-477 (U.S. argued Dec. 4, 2024), which is set to resolve whether prohibiting sex-reassignment surgeries altogether for minors violates the Equal Protection Clause. The Equal Protection analysis in both cases will be materially the same.

Petitioner does not request plenary review from this Court; rather, she requests that the Court hold this petition for a writ of certiorari pending its decision in *Skrmetti* and then dispose of the petition as appropriate in light of that decision.

In addition—and regardless of whether the Court holds the petition pending *Skrmetti*—Petitioner requests that the Court summarily reverse the Ninth Circuit's holding regarding clearly established law. This Court has not hesitated to summarily reverse errant Ninth Circuit denials of qualified immunity,[3] and the circuit's latest conclusion that a legal question that has split circuits and reached this Court on certiorari is already conclusively settled—based on a supposed "'robust consensus' of district court cases," App.5a—is as good a candidate for summary reversal as any.

I. The Court Should Hold This Petition Pending *United States v. Skrmetti*.

The Ninth Circuit was wrong to hold that heightened scrutiny applies to an alleged policy of denying Medicaid coverage for sex-reassignment surgeries. Such a policy does not classify on the basis of sex or transgender status—whether a treatment is covered turns solely on the diagnosis for which it is sought. Under this Court's precedents, that means the policy is subject to rational basis review even if it disparately impacts males, females, or transgender individuals.

Fortunately, this Court can correct the Ninth Circuit's faulty decision without granting plenary review because the Court is already slated to decide a case presenting essentially the same question. *United States v. Skrmetti*, No. 23-477. The Court

[3] *E.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) (per curiam); *City of Escondido v. Emmons*, 586 U.S. 38 (2019) (per curiam); *Kisela v. Hughes*, 584 U.S. 100 (2018) (per curiam).

should therefore hold this petition pending *Skrmetti*, then dispose of the petition as appropriate—such as through a GVR—so Petitioner can receive the benefit of the *Skrmetti* decision.

A. A Policy Excluding Sex-Reassignment Surgeries From Medicaid Coverage Is Not Subject To Heightened Scrutiny.

Even accepting as true the complaint's allegation that Idaho Medicaid had a policy of denying coverage for sex-reassignment surgeries, and even assuming for the sake of argument that transgender status is a quasi-suspect class,[4] the alleged policy is not subject to heightened scrutiny under the Equal Protection Clause.

1. *Geduldig v. Aiello* provides all the Court needs to resolve the Equal Protection question presented here. 417 U.S. 484 (1974). There, the Court addressed whether California's disability insurance program violated the Equal Protection Clause by exempting from coverage any work loss resulting from pregnancy. *Id.* at 489–90.

The Court held that there was no constitutional infirmity—on its face, the insurance program did

[4] Because Ninth Circuit precedent holds that transgender status is a quasi-suspect class, *see Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019), the parties did not brief that issue below. So this petition assumes that transgender status is a quasi-suspect class. However, the quasi-suspect class question is before the Court in *Skrmetti*, *see* Brief of Petitioner at 28–31, *United States v. Skrmetti*, No. 23-477 (Aug. 27, 2024), and if the Court holds this petition and disposes of it in light of *Skrmetti*, the Ninth Circuit would be bound to apply this Court's resolution of the question.

"not exclude anyone from benefit eligibility because of gender." *Id.* at 496 n.20. That much was clear even upon "the most cursory analysis." *Id.* Excluding pregnancy from coverage divides program participants into two groups: those who are pregnant (which includes only women), and those who are not (which includes men *and* women). *Id.* The fact that women are on both sides of the divide defeats any claim that the exclusion creates a sex-based classification. *Id.*

To be sure, excluding pregnancy from coverage exclusively *affects* women because "only women can become pregnant." *Id.* However, "it does not follow that every legislative classification concerning pregnancy is a sex-based classification" triggering heightened scrutiny. *Id.* Instead, "lawmakers are constitutionally free" to draw distinctions based on pregnancy or "any other physical condition" for "any reasonable basis," as long as the distinctions "are [not] mere pretexts designed to effect an invidious discrimination against the members of one sex or the other." *Id.* The financial benefits of not covering pregnancy easily supplied a "reasonable basis" for the exclusion. *Id.*

Geduldig is not an outlier in the Court's Equal Protection jurisprudence. Across a variety of contexts, the Court has made clear that "official action will not be held unconstitutional solely because it results in a [] disproportionate impact." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (collecting cases). Rather, "[p]roof of [] discriminatory intent or purpose is required." *Id.*

Indeed, this Court had no difficulty applying *Geduldig* to an abortion restriction two years ago in *Dobbs v. Jackson Women's Health Organization*. 597 U.S. 215, 236 (2022). Its analysis was "brief[]" and straightforward—the argument that an abortion restriction violates Equal Protection because it uniquely burdens women is "squarely foreclosed" by precedent because "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination." *Id.* (quoting *Geduldig*, 417 U.S. at 496 n.20) (cleaned up). And "the goal of preventing abortion does not constitute invidiously discriminatory animus against women." *Id.* (cleaned up).

Geduldig's application to this case is equally straightforward. On its face, the alleged policy denying Medicaid coverage for "gender-affirming surgery for the treatment of gender dysphoria," App.93a, does not classify on the basis of sex or transgender status, but on the basis of diagnosis. The only things one must know to apply the policy are (1) the surgery sought and (2) the diagnosis to be treated. The alleged policy is entirely agnostic as to whether the Medicaid participant is a man, woman, or an individual identifying as transgender—*no* participant receives coverage for the indicated surgeries if the purpose is to treat gender dysphoria.

This condition-based coverage distinction is therefore valid as long as it serves "any reasonable basis." *Geduldig*, 417 U.S. at 496 n.20. The financial, safety, and moral considerations in denying coverage for sex-reassignment surgeries comfrotably clear

that low hurdle. *See Kadel v. Folwell*, 100 F.4th 122, 195–96 (4th Cir. 2024) (Wilkinson, J., dissenting) (discussing medical debate regarding safety and efficacy of sex-reassignment surgeries); *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (noting "sharply contested medical debate over sex reassignment surgery").

Certainly, as in *Geduldig*, it is likely that the alleged policy will uniquely burden certain groups. Most Medicaid participants who seek coverage for sex-reassignment surgery to treat gender dysphoria may self-identify as transgender in some way at the time.[5] And those who are denied coverage for specific sex-reassignment surgeries to treat gender dysphoria will be exclusively natal men (penectomies, orchiectomies, vaginoplasties, etc.) or natal women (mastectomy, phalloplasty, etc.) depending on the surgery.

[5] The concept of "being transgender" is multifarious enough that it is impossible to say whether those who have gender dysphoria and seek surgeries "are transgender." *Compare* App.59a–60a, *with* Diagnostic and Statistical Manual of Mental Disorders (5th ed. text revision 2022), at 511 (providing distinct definitions of "transgender" in relation to gender dysphoria and gender identity). Moreover, it is unclear whether those who desist or de-transition are no longer transgender (so the term does not describe an immutable condition) or were never transgender to begin with (undermining the argument that the alleged policy classifies on the basis of transgender status).

Because the Equal Protection analysis described here is the same even if *everyone* denied coverage for sex-reassignment surgeries used to treat gender dysphoria "is transgender," this petition assumes that such is the case for this petition only.

But "it does not follow" that the alleged policy "is a sex-based [or transgender-based] classification." *Geduldig*, 417 U.S. at 496 n.20. All a disproportionate impact proves is that the alleged policy is a "regulation of a medical procedure that only one sex can undergo," or that predominantly individuals identifying as transgender chose to undergo. *Dobbs*, 597 U.S. at 236–37. And such regulations "do[] not trigger heightened constitutional scrutiny" no matter how uniquely they burden one sex or the other. *Id.*

Under *Geduldig*, the only way the alleged policy receives heightened scrutiny is if it is a "mere pretext[] designed to effect an invidious discrimination against the members of one sex or the other." 417 U.S. at 496 n.20. But there is no evidence of animus here—there is certainly no subjective evidence of animus, and the alleged policy does not otherwise target an "irrational object of disfavor" peculiar to "a particular class of people" (like a tax on wearing yarmulkes). *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). As explained, there are wholly rational reasons for a State not to cover these surgeries to treat gender dysphoria. *See Kadel*, 100 F.4th at 188 (Richardson, J., dissenting) ("States have finite resources to spend on healthcare, so they must prioritize those treatments that they deem cost-effective and medically necessary.").

2. The Ninth Circuit's single paragraph of analysis on this issue provides no sound basis for reaching a contrary result. App.4a–5a. It reasoned that the alleged policy "creates a classification on the basis of transgender status and sex" because it

"exclusively burdens transgender beneficiaries relative to cisgender beneficiaries." App.5a. That defies *Geduldig*'s central teaching, which is that a medical regulation imposing an exclusive burden on the only sex that can undergo a procedure (or on transgender individuals, assuming they are a quasi-suspect class) does *not* create a classification triggering heightened scrutiny. 417 U.S. at 496 n.20.

The Ninth Circuit tried to distinguish *Geduldig*, but its distinction makes no sense. In a single sentence, it explained that this case is different because in *Geduldig* "no sex was comparatively disadvantaged in seeking disability insurance coverage." App.5a. This assertion is bizarre. "[O]nly women can become pregnant," 417 U.S. at 496 n.20, so excluding pregnancy from disability insurance coverage *solely* "disadvantages" women relative to men. That is no different than a health-insurance exclusion removing coverage for a treatment that only individuals self-identifying as transgender are likely to seek.

Though its limited analysis does not say so clearly, the Ninth Circuit's main justification for its holding seems to be that the alleged policy denies Medicaid coverage for certain surgeries—penectomies, vaginoplasties, and mastectomies, for example—when used to treat gender dysphoria, but covers them when used to treat other conditions like cancer, symptomatic gynecomastia, or other congenital defects. As the Ninth Circuit frames it, the alleged policy treats transgender beneficiaries different than "other, non-transgender Medicaid beneficiaries when seeking Medicaid coverage for the

same medically necessary surgeries." App.5a (emphasis added).

But surgeries used to treat gender dysphoria are not the "same" as surgeries used to treat other conditions. For example, a surgery may be called a vaginoplasty whether it is used to repair a natal woman's vagina or construct a vagina for a natal man, but the two surgeries will look very different in practice. "For a natal man to undergo a vaginoplasty, the testicles will be removed, the urethra will be shortened, and the penile and scrotal skin will be used to line the neovagina," none of which is necessary for a natal woman. *Lange v. Houston Cnty.*, 101 F.4th 793, 802 (11th Cir. 2024) (Brasher, J., dissenting) (cleaned up). Or consider a phalloplasty—for a natal woman, the procedure "involves removal of the uterus, ovaries, and vagina, and creation of a neophallus and scrotum with scrotal prostheses, which is a multistage reconstructive procedure." *Id.* (cleaned up).

Even where sex-reassignment surgeries bear a closer resemblance to surgeries used to treat other diagnoses, they still are not the "same" surgery. Surgeries intended to alter the physical characteristics of someone's biological sex have different risk profiles than those that don't. The alternative treatment options are different, the risks of foregoing surgery are different, and—as relevant for insurance purposes—the costs are different. And that's to say nothing of the considerable medical, psychiatric, and moral debates that persist regarding sex-reassignment surgeries. *See Kadel*, 100 F.4th at 195–96 (Wilkinson, J., dissenting) (discussing this debate).

The fact that sex-reassignment surgeries are not the same as similar surgeries used for other conditions makes all the difference for Equal Protection purposes. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). But the "Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940). So the Ninth Circuit's apples-to-oranges comparison of coverage for distinct surgeries cannot show an Equal Protection violation because those seeking each type of surgery are not similarly situated.

When comparing apples to apples, it becomes clear that the policy the plaintiffs have alleged entails no discrimination. Both those who identify as transgender and those who do not, for example, (1) can obtain a mastectomy to treat cancer or other approved condition, and (2) cannot obtain a mastectomy to treat gender dysphoria. In other words, the alleged policy classifies on the basis of diagnosis, and this case falls squarely within the scope of *Geduldig*.

B. This Appeal Implicates the Same Question As *Skrmetti*.

If these arguments sound familiar to the Court, it's because they are. The question presented in this case is conceptually indistinguishable from the one presented in *United States v. Skrmetti*, No. 23-477, which is currently pending before the Court and was presented for oral argument the day before this petition was filed. That case involved a law

prohibiting sex-reassignment surgeries for minors, and this case involves an alleged policy denying Medicaid coverage for sex-reassignment surgeries. *See* Pet. for Writ of Cert. at I, *United States v. Skrmetti*, No. 23-477 (Nov. 6, 2023). In both cases, the relevant question is whether there is a classification on the basis of sex or transgender status.

The only two distinctions between the two cases make no difference in how the case is analyzed. Whether the case involves a limitation on insurance coverage or access for sex-reassignment surgeries does not alter the classification question under the Equal Protection Clause—in either case, the question is whether the limitation classifies on the basis of sex or transgender status if it applies based on the treatment sought and the patient's diagnosis. *Compare* Tenn. Code Ann. § 68-33-103(a)(1) (prohibiting "perform[ing] . . . a medical procedure if the" purpose is "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity"), *with* App.93a (alleging a "policy of refusing to authorize . . . gender-affirming surgery for the treatment of gender dysphoria").

Moreover, the fact that *Skrmetti* exclusively involves minors and the alleged Idaho Medicaid policy applies to both minors and adults should not affect the relevant classification question. In both cases, the facial distinctions operate in the same way—whether minors or adults, the limitation applies based on the treatment sought and the patient's diagnosis. Perhaps the minor-specific nature of the statutes in *Skrmetti* will play a role in the States' justification for the laws, *see L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 419 (6th Cir.

2023) (noting in rational-basis analysis that "[t]he State plainly has authority, in truth a responsibility, to look after the health and safety of its children"), but only the classification question is at issue in this appeal. App.5a–6a.

Because the analysis in *Skrmetti* will bear on—and will likely be dispositive of—the question presented in this petition, Petitioner requests that the Court hold the petition pending a decision in *Skrmetti*, then dispose of it as appropriate in light of that decision.

Without this relief, the case will continue to proceed in the district court along a prolonged and distorted path. The plaintiffs have already attempted to use the Ninth Circuit's decision as law of the case in district court, and if successful, the case will inevitably devolve into an expensive battle of medical experts over the scientific debate surrounding sex-reassignment surgeries, as the parties litigate whether there is a persuasive justification for excluding the surgeries from coverage.[6] That is all unnecessary—there is no sex or transgender discrimination to begin with, and the law easily satisfies rational basis review.

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[6] Litigation is currently proceeding in district court based on Idaho's recent statute excluding the surgeries at issue (as well as hormones) from Medicaid coverage. 2024 Idaho Sess. Laws 744 (effective July 1, 2024). But since the statute aligns with the alleged policy from the original complaint, the Equal Protection question remains materially identical to the one posed by the original complaint.

II. The Ninth Circuit's Errant "Clearly Established" Analysis Should Be Summarily Reversed.

While the Equal Protection analysis above implicates whether the plaintiffs have alleged a "violation of a constitutional right" (the first prong of qualified immunity), the Ninth Circuit's decision concerning "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct" (the second prong of qualified immunity) is also in need of correction. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (cleaned up).

According to this Court, qualified immunity applies unless the plaintiffs' rights were "sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added) (cleaned up). The Court holds that qualified immunity "protects all but the *plainly incompetent* or those who knowingly violate the law." *Id.* at 743 (emphasis added) (cleaned up).

The Ninth Circuit has not always agreed. By now the circuit has a long tradition of bending or ignoring Supreme Court precedent to deny immunity in cases where this Court would grant it—in fact, the tradition has grown so undeniable that in the last thirteen years, this Court has criticized the circuit by name in three qualified immunity decisions. *Id.* at 742 ("We have repeatedly told courts—and the Ninth Circuit in particular—not to define clearly

established law at a high level of generality.") (citation omitted).[7]

In this case, the Ninth Circuit followed its tradition. By denying qualified immunity, it implicitly held that no reasonable official could have thought Petitioner's actions were legal—that any official who did was "plainly incompetent." *al-Kidd*, 563 U.S. at 743. But by the time it reached those conclusions, this Court had already granted certiorari in *United States v. Skrmetti*, No. 23-477, and no fewer than *eleven* federal circuit judges (now thirteen) had concluded that denying or prohibiting sex-reassignment treatments did not violate the Equal Protection Clause.[8]

Certiorari in *Skrmetti*, by itself, already demonstrates the law was not clearly established. As explained, the Equal Protection question in *Skrmetti* is materially identical to the one presented here—does government action restricting access (or in this case, denying insurance coverage) for sex-reassignment treatments discriminate on the basis of sex or transgender status? *See* Pet. for Writ of Cert. at 16–17, *United States v. Skrmetti*, No. 23-477 (Nov. 6, 2023). If this question was "unsettled"

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[7] *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015) (same); *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (same); *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004).

[8] *See Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1227 (11th Cir. 2023) (three-judge majority); *Skrmetti*, 73 F.4th at 419 (two-judge majority); *Kadel*, 100 F.4th at 164 (six-judge dissent); *K.C. v. Individual Members of Med. Licensing Bd. of Indiana*, 121 F.4th 604, 617 (7th Cir. 2024) (two-judge majority).

enough to warrant certiorari review, *Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 434 (1996); Sup. Ct. R. 10(a), then it certainly isn't so "beyond debate" that "every reasonable official" should know the answer. *Reichle*, 566 U.S. at 664 (cleaned up).

And if certiorari in *Skrmetti* were not dispositive by itself, the circuit split that led to certiorari would be. Again, the constitutional question cannot be clearly settled if federal appellate judges disagree about how to resolve it. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (basing grant of qualified immunity on a "split among the Federal Circuits").

Three circuits have held that government actions "target[ing] specific medical interventions" used to treat gender dysphoria do not "classif[y] on the basis of any suspect characteristic under the Equal Protection Clause." *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1227 (11th Cir. 2023). As these courts have explained, regulating access to "treatment for purposes of treating discordance between biological sex and sense of gender identity for *all*" "establishes a rule that applies equally to both sexes." *Id.* at 1228 (emphasis in original); *L.W. ex rel. Williams v. Skrmetti*, 73 F.4th 408, 419 (6th Cir. 2023) (a law that "bans gender-affirming care for minors of both sexes . . . does not prefer one sex to the detriment of the other"); *K.C. v. Individual Members of Med. Licensing Bd. of Indiana*, 121 F.4th 604, 617 (7th Cir. 2024) ("Nobody may receive the treatment the state has chosen to regulate. So, sex

does not indicate on what basis treatment is prohibited.").[9]

In contrast, only two circuits have taken the position that the Ninth Circuit now holds to be clearly established. *See Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 669–71 (8th Cir. 2022) (concluding that a law prohibiting sex-reassignment surgeries for minors "classif[ies]" based on the "biological sex of the minor patient"); *Kadel v. Folwell*, 100 F.4th 122, 141–56 (4th Cir. 2024), *cert. petition pending*, No. 24-99. And in one of those two circuits—the Fourth—the matter had to be taken *en banc* and was ultimately resolved by a vote of 8-6. *Kadel*, 100 F.4th at 132; *see al-Kidd*, 563 U.S. at 743 (granting qualified immunity where "eight Court of Appeals judges" dissented).

For its part, the Ninth Circuit has no binding law addressing whether limiting access or coverage for sex-reassignment surgeries (or even hormone treatments) classifies on the basis of sex or transgender status.[10] The fact that "the question was open at the time" of the relevant events in the circuit is reason enough for qualified immunity to apply,

[9] These circuits have also rejected the theory of transgender-based discrimination under the Equal Protection Clause. *Eknes-Tucker*, 80 F.4th at 1230; *Skrmetti*, 73 F.4th at 419–21; *K.C.*, 121 F.4th at 620–21

[10] There is Ninth Circuit precedent holding that transgender status is a quasi-suspect class. *See Karnoski*, 926 F.3d at 1200–01 (policy excluding openly transgender individuals from military service). But that does not answer whether Idaho's alleged Medicaid policy *classifies on the basis of* transgender status. That is the question that was at issue in this appeal, and that question has split the circuits.

Mitchell v. Forsyth, 472 U.S. 511, 535 (1985), but a circuit split so entrenched that it warrants certiorari review should have sealed the deal. *Reichle*, 566 U.S. at 669–70.

Despite all this judicial disagreement, the Ninth Circuit ruled the law was clear and denied qualified immunity. To reach this conclusion, it had to commit three clear legal errors.

First, the circuit did precisely what this Court has told it repeatedly not to do: it "define[d] clearly established law at a high level of generality." *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015). It began its analysis by declaring that "the Equal Protection Clause's non-discrimination principle is so clear that all public officials must be charged with knowledge of it." App.5a (cleaned up) (citing *Elliot-Park v. Manglona*, 592 F.3d 1003 (9th Cir. 2010) (racial-discrimination claim against police officers for failing to investigate a crime)).

There may not be any way to consider an Equal Protection question at a *higher* level of generality than the Ninth Circuit's "don't discriminate" formulation.

Second, the Ninth Circuit disregarded every case decided after July 2022, which was the last date mentioned in the complaint as part of the coverage denial. *E.g.*, *Skrmetti*, 73 F.4th at 415 (July 2023); *Eknes-Tucker*, 80 F.4th at 1226 (August 2023). Those cases (listed above) were extant at the time of the Ninth Circuit's decision and addressed in the briefs, yet they went unmentioned in the court's qualified immunity analysis. The Ninth Circuit did not believe those cases were inapplicable—it admitted

elsewhere in the opinion that *Skrmetti* raises "similar Equal Protection issues." App.4a n.2. Instead, the court seems to have believed that it could limit its consideration to only those cases existing "[a]t the time of [Petitioner's] coverage denials." App.5a.

That approach directly contradicts how this Court has analyzed qualified immunity. Repeatedly, it has considered case law postdating the government official's actions in assessing whether a right is clearly established. *Wilson*, 526 U.S. at 618 ("Between the time of the events of this case and today's decision, a split among the Federal Circuits in fact developed on the question"); *Reichle*, 566 U.S. at 669–70 (considering cases from "other Federal Courts of Appeals" both "[s]hortly before [the plaintiff's] arrest" and "since [the plaintiff's arrest]"); *Pearson*, 555 U.S. at 244 ("The Sixth Circuit reached the same conclusion after the events that gave rise to respondent's suit").

Considering case law decided after the relevant government actions makes perfect sense, too. Qualified immunity bars a claim for damages unless "every reasonable official" would understand that conduct is unconstitutional, *Reichle*, 566 U.S. at 664 (cleaned up), so the fact that more than a dozen federal appellate court judges looking at the same controlling law as Petitioner believe that her actions were constitutional is overwhelming evidence that she did not violate a clearly established right. "If judges [] disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." *Id.* at 669–70 (cleaned up).

Third, having omitted every circuit court decision from both sides of the circuit split from the analysis, the Ninth Circuit concluded the right at issue was clearly established by a "'robust consensus' of district court decisions" from across the country—three decisions in total, spanning just four years, and all outside the Ninth Circuit. App.5a–6a.

Though this Court has indicated that district court opinions can play a role in the qualified immunity analysis, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.32 (1982), it has never (as far as Petitioner can tell) denied qualified immunity based on district court opinions alone, much less a three-decision "consensus" that was broken up as soon as courts of appeals began reviewing it.

But in all events, there was no "robust consensus of district court decisions" to begin with. One of the cases the Ninth Circuit cited *rejected* the Ninth Circuit's position, deeming "suspect" the argument that a county insurance plan's exclusion of sex-reassignment surgeries "is facially discriminatory," and "assuming" that it "fails" based on *Geduldig*. *Lange v. Houston Cnty.*, 499 F. Supp. 3d 1258, 1275–76 (M.D. Ga. 2020). The court allowed the Equal Protection claim to go forward only under the exception for laws that are "mere pretexts designed to effect an invidious discrimination." *Id.* (quoting *Geduldig*, 417 U.S. at 496 n.20); *see Lange v. Houston Cnty.*, 608 F. Supp. 3d 1340, 1354 (M.D. Ga. 2022) (conclusively determining later that the facial discrimination theory was "foreclosed" by *Geduldig*).

In other words, *Lange* concluded that Petitioner's legal position was probably correct, rather than the Ninth Circuit's. And as explained above—and as the

Sixth, Seventh, and Eleventh Circuits agree—Petitioner's is the only reasonable interpretation of *Dobbs* and *Geduldig*.

Of the two remaining cases the Ninth Circuit cited, one addressed Equal Protection only "briefly," and its discussion contains no analysis as to why denying coverage for sex-reassignment surgeries classifies on the basis of sex or transgender status. *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951 (W.D. Wis. 2018). The other, on appeal, drew the six-judge dissent from the Fourth Circuit. *Fain v. Crouch*, 618 F. Supp. 3d 313, 327 (S.D. W. Va. 2022). And in constructing its "consensus," the Ninth Circuit ignored a decision from a state's highest court upholding the denial of social services funding for sex-reassignment surgery. *Denise R. v. Lavine*, 347 N.E.2d 893, 894–95 (N.Y. 1976).

Somehow, the Ninth Circuit determined that any official reading the three district court decisions it cited would have to be "plainly incompetent" to conclude that the Equal Protection Clause permits States to deny Medicaid coverage for sex-reassignment surgeries used to treat gender dysphoria. *al-Kidd*, 563 U.S. at 742–43. Never mind that thirteen circuit judges have reached essentially that conclusion, and that this Court deemed essentially the same question to be worthy of certiorari review in *Skrmetti*.

This qualified immunity decision is not just wrong, it's egregiously wrong, and it warrants summary reversal.

CONCLUSION

The Court should hold this petition pending its decision in *Skrmetti*, and then dispose of it as appropriate in light of that decision. Additionally, whether or not the Court holds the petition, it should summarily reverse the Ninth Circuit's holding that *Skrmetti*'s outcome was "clearly established" in 2022.

Respectfully submitted,

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