No. 24-631

In The
Supreme Court of the United States

DR. MAGNI HAMSO, individually and in her Official Capacity as the Medical Director of the Idaho Division of Medicaid,

Petitioner,

v.

M.H., et al.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether an Idaho policy prohibiting adult transgender Medicaid beneficiaries diagnosed with gender dysphoria from receiving medically necessary "sex reassignment surgeries" for the purpose of changing their appearance, while adult cisgender Medicaid beneficiaries can receive the same treatment discriminates in violation of the Equal Protection Clause of the Fourteenth Amendment.

Whether the denial of qualified immunity without prejudice, under the facts plausibly alleged and taken as true at the motion to dismiss stage, was a "clearly established" violation of the Equal Protection Clause of the Fourteenth Amendment.

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INTRODUCTION

M.H. and T.B. are adult transgender women. They were assigned male at birth but identify as female today. M.H. and T.B. receive healthcare from Idaho Medicaid under the Medicaid Act, 42 U.S.C. § 1396a. M.H.'s and T.B.'s medical providers diagnosed the severity of their clinically significant distress as gender dysphoria and recommended that surgeries were medically necessary. Petitioner denied M.H.'s surgery finding she had not completed twelve-months of hormone therapy. Pet. App. 54a-55a. M.H. established that she completed twelve months of hormone therapy. *Id.* at 55a. A nurse determined the surgery was considered "cosmetic." *Id.* T.B. applied for surgery to treat her gender dysphoria. Petitioner never acted upon T.B.'s request. *Id.* at 55a-56a. For transgender individuals, the incongruence between their gender identity and assigned sex at birth can result in clinically significant distress known as gender dysphoria. *Id.* at 60a. Gender dysphoria is a serious medical condition and can cause anxiety, depression, and self-harm, or suicidal ideation. *Id.* at 61a. Medicaid denied these requests (either outright or by virtue of repeated, unresolved delays). Idaho's Governor issued a letter opposing M.H.'s and T.B.'s use of Medicaid "to pay for irreversible sex reassignment surgeries, puberty blockers, or hormones for the purpose of changing the appearance of any child's or adult's sex." Dkt. 33-1.

M.H. and T.B. filed a Complaint challenging Idaho's Medicaid Exclusion Policy of denying adult transgender Medicaid beneficiaries medically necessary surgeries alleging violation of their federal

constitutional and statutory rights. Petitioner asserts the Equal Protection questions in Ninth Circuit's qualified immunity decision are "nearly indistinguishable" from the appeal in *United States v. Skrmetti*, No. 23-477, challenging the denial of a preliminary injunction. Pet. 1. Petitioner hypothesizes because the Equal Protection questions "will likely be answered by *Skrmetti*," the Court should hold the Petition until it is decided or grant certiorari because "*Skrmetti's* mere existence" proves no rights were clearly established. Pet. 1-2. The Court should not depart from longstanding restrictions on the interlocutory appellate review from the denial of qualified immunity based upon conjecture and speculation on the outcome of *Skrmetti*.

Skrmetti and the circuit cases Petitioner relies upon are based upon entirely different sets of facts regarding state legislatures' regulation of medical treatments for minors which does not include surgeries. *Id.* Petitioner conspicuously disregards the key distinction between the legislature's ability to regulate medical treatments for minors and the Medicaid Exclusion Policy for purposes of Equal Protection. The majority in *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023) recognized that a key distinction in the application of Equal Protection was age. "Adults may use drugs and surgery to transition from one gender to another. But children may not. That classification is eminently reasonable and does not trigger heightened review." *Id.*

The trial court held that at the motion to dismiss stage Petitioner did not meet her burden of showing an

entitlement of qualified immunity. Pet. App. 39a-40a. The court held Petitioner's claim of qualified immunity was premature and undeveloped but could be raised through a motion for summary judgment. Pet. App. 44a. The Ninth Circuit affirmed the denial of qualified immunity without prejudice because the law was clearly established. The decision was limited in scope.

The Ninth Circuit's decision does not conflict with the Circuit cases relied upon by Petitioner concerning legislative bans applicable to minors not adults. This appeal concerns a discrete population of adult transgender Medicaid beneficiaries who are protected from discrimination on the basis of sex and transgender status by clearly established statutory and constitutional case precedents. Petitioner mischaracterizes *Skrmetti*. The Ninth Circuit's decision was narrow and not final. Pet. App. 6a. Petitioner does not point to a genuine circuit split or an actual holding in a single case which addresses an exclusion policy prohibiting adult Medicaid beneficiaries from receiving "sex-reassignment surgeries" for the medically necessary treatment of gender dysphoria which Petitioner conceded was a proxy for discrimination on the basis of sex and transgender status. Pet. App. 5a. The granting of the Petition without a developed record is unwarranted and premature.

Petitioner's suggestion there is a circuit split between three Circuits upholding statewide regulation of access to medical procedures for minors is premised on a fundamental mischaracterization of *Skrmetti* and the Ninth Circuit's decision. Pet. 20. Exaggerated

speculation on the outcome of *Skrmetti* is not a reason to hold or grant the Petition. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence" dictates "awaiting...the benefit of…lower court opinions squarely addressing" an issue before this Court intervenes.).

STATEMENT OF THE CASE

A. M.H.'s and T.B.'s Factual Allegations in the Complaint

1. M.H. and T.B. are adult transgender women. Pet. App. 72a & 83a. They were assigned male at birth but identify as female today. Pet. App. 74a & 83a. M.H.'s and T.B.'s medical providers diagnosed the severity of their clinically significant distress as gender dysphoria and recommended that surgeries were medically necessary to address their significant distress related to gender dysphoria. Pet. App. 74a-75a, 84a-85a, & 87a. M.H. and T.B. submitted the medical records and physician recommendations establishing medical necessity. *Id*.

2. Petitioner, Medicaid's Medical Director, denied M.H.'s surgery finding she had not completed twelve-months of hormone therapy recommended by the World Professional Association for Transgender Health Standard of Care ("WPATH"). Pet. App. 76a. Petitioner's denial indicated that MH could resubmit her request after completing the recommended 12 months of hormone therapy. *Id*. M.H. appealed and established she had undergone twelve months of hormone therapy and the surgery was not "cosmetic." Pet. App. 77a-78a. A nurse reviewer, without any

prior notice, testified on appeal that Medicaid would not authorize the surgery because it was "cosmetic." Pet. App. 78a. M.H.'s notice of denial did not provide any basis other than a lack of 12 months of hormone therapy. Petitioner refused to formally approve or deny MH's request and claimed the request remained pending. Pet. App. 78a. MH did not receive medically necessary treatment prescribed by her physicians to alleviate her ongoing symptoms of gender dysphoria. Pet. App. 83a.

3. TB has identified as female as long as she can remember. Pet. App. 83a-84a. When TB was 11 and 12 years old, she had to be admitted to two mental health facilities after she attempted to take her life because she could not be true herself. Pet. App. 84a. TB has lived fully as a female since 2015, including attending school and in 2016, she legally changed her masculine first name to a feminine first name. *Id.* She was diagnosed and treated for gender dysphoria in 2016 by her psychiatrists in Texas and then in Colorado. Pet. App. 84a-85a. In May of 2022, TB's medical providers submitted a request for prior authorization for gender affirming surgeries, stating that the requested procedures were a matter of medical necessity to treat TB's gender dysphoria. Pet. App. 85a. TB's physicians wrote: "Our surgical team at [redacted], and four independent mental health professionals have thoroughly assessed this patient using the WPATH Standards of Care and have determined vaginoplasty to be a medically necessary procedure for [TB]. In our assessment, delay or denial of this medically necessary procedure would harm the health of this patient and put her well-being at risk." Pet. App. 87a. TB's request was supported by her psychiatrists, clinical social worker, and psychologist.

Id. 178. Petitioner never acted upon T.B.'s request. Pet. App. 88a-89a.

4. "Gender dysphoria is the clinically significant distress that transgender individuals experience due to having a gender identity that conflicts with the sex they were assigned at birth." Pet. App. 53a. For transgender individuals, the incongruence between their gender identity and assigned sex can result in clinically significant distress known as gender dysphoria. Pet. App. 60a. Gender dysphoria is a serious medical condition recognized by the American Psychiatric Association. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451-53 (5th ed. 2013) ("DSM-V"). *Id*. If left untreated, gender dysphoria can cause anxiety, depression, self-harm, or suicidal ideation. Pet. App. 61a. Untreated gender dysphoria often intensifies with time; the longer a transgender individual goes without or is denied adequate treatment for gender dysphoria, the greater the risk of severe harm to the individual's health. *Id*. Health care providers follow well-established standards of care in treating patients with gender dysphoria. *Id*. A cisgender individual does not "have a gender identity that is different form their assigned sex" and would not experience distress associated with a diagnosis of gender dysphoria. Pet. App. 60a.

5. "Decades of research and clinical practice has shown that gender-affirming medical care, including surgery, can be lifesaving treatment and has a positive impact on the short- and long-term health outcomes for transgender people." Pet. App. 65a. Every major medical and psychiatric association

supports the WPATH Standards and recognizes surgeries are safe, effective, and necessary treatments for gender dysphoria. *Id.*

B. Procedural History

1. On September 29, 2022, M.H. and T.B filed a Complaint alleging Medicaid's unwritten "exclusion policy" of denying transgender Medicaid beneficiaries medically necessary surgical care violated Section 1557 of the Patient Protection and Affordable Care Act, three provisions of the Medicaid Act, the Equal Protection Clause, and the Due Process Clause. Pet. App. 57a. The Complaint requested prospective injunctive and declaratory relief under 42 U.S.C. § 1983. *Id.* The Complaint requested damages against Petitioner, in her individual capacity, on the constitutional claims. *Id.*

2. Petitioner filed a partial Motion to Dismiss on the constitutional claims and asserted a qualified immunity defense pursuant to Fed. R. Civ. Proc. 12(b)(6). Pet. App. 17a. The district court accepted as true the Complaint's factual allegations in a light most favorable to Respondents. Pet. App. 17a-18a. At the time the Complaint was filed Medicaid's exclusion policy was unwritten. Pet. App. 30a n.7. The court examined and analyzed the equal protection framework including the types of classifications and the different levels of scrutiny which apply to the types of classifications. Pet. App. 19a-26a.

3. Petitioner, one day before the Motion to Dismiss hearing, filed a Notice of Supplemental Information attaching a May 1, 2023 letter from Idaho's Governor

to former director of the Idaho Department of Health and Welfare. Dkt. 33-1. The Governor stated he was aware that he was sued for not pre-authorizing Medicaid for "sex reassignment surgeries." *Id.* He further stated "it is unclear whether Medicaid provides coverage for such procedures." *Id.* The Governor indicated he opposed Medicaid paying "for the sex reassignment surgeries, puberty blockers, or hormones for the purpose of changing the appearance of any child's or adult's sex." *Id.* The Governor directed Jeppesen "to take all appropriate steps to implement a policy consistent with state and federal law excluding the same from Medicaid coverage." *Id.* The Governor's letter did not make any reference to the treatment of gender dysphoria. *Id.*

4. The court found the Complaint alleged both a facial and as-applied Equal Protection challenge because Medicaid's policy "operates to classify transgender people (classified group) and deny them medically necessary genital reconstruction surgery to treat gender dysphoria. Meanwhile, cisgender individuals (a similarly-situated group) routinely receive coverage for the same or similar procedures, namely medically necessary genital reconstruction surgery to treat ailments other than gender dysphoria." Pet. App. 30a. Petitioner argued "that transgender persons receive the exact same coverage as cisgender persons: neither group is covered for genital reconstruction surgery to treat gender dysphoria..." Pet. App. 31a.

The court concluded: "[a]t this stage, however, the Court must accept how Plaintiffs' allegations, and the inferences therefrom, have framed the issue." Pet. App. 33a. The court found while Medicaid's "policy

appears gender-neutral and directed at a medical condition...[y]et, exclusively transgender persons – and not cisgender persons – suffer from gender dysphoria." *Id.* The court observed the exclusion denies surgery to treat gender dysphoria but grants cisgender persons coverage for the same surgeries for all other conditions applying to them. Pet. App. 33a-34a.

5. The court held the Complaint effectively distinguished this case from *Geduldig v. Aiello*, 417 U.S. 484 (1974) where the exclusion of pregnancy was not a proxy for discrimination against women. Pet. App. 35a. The Complaint effectively alleged the "no-surgery-for-gender-dysphoria policy is a proxy for discrimination against transgender persons" while cisgender persons can have their materially same surgeries covered. *Id.* The court held Medicaid's policy treated transgender individuals differently than cisgender individuals when they denied medically necessary treatment of their gender dysphoria. Pet. App. 36a. "Whether framed as proxy discrimination based upon disparate impact or facial discrimination based upon the wording of the policy, Plaintiffs' allegations, and the inferences drawn therefrom, state a plausible Equal Protection claim. At this stage, and on the record before the Court, *Geduldig* does not alter this conclusion." Pet. App. 36a-37a (internal citation omitted).

6. The district court held, at the motion to dismiss stage, Petitioner did not meet her burden of showing an entitlement of qualified immunity. Pet. App. 39a-41a. The court held Petitioner's claim of qualified immunity was premature and undeveloped but "Dr.

Hamso may reassert her entitlement to qualified immunity with a more fulsome record and through a motion for summary judgment." Pet. App. 44a. Petitioner filed an interlocutory appeal from the denial of qualified immunity on a motion to dismiss. Pet. App. 1a-6a. The Ninth Circuit affirmed the denial of qualified immunity on the Equal Protection claim without prejudice but reversed the denial of qualified immunity on the Due Process claim. Pet. App. 6a.

REASONS FOR DENYING THE PETITION

A. The Questions In This Appeal Are Different Then *Skrmetti*

Petitioner requests this Court to grant review because the questions in this case are conceptionally indistinguishable from *Skrmetti*. Pet. 15. The factual and legal question in *Skrmetti* of whether "prohibiting for sex-reassignment surgeries for minors" and whether the "policy denying Medicaid coverage for sex-reassignment surgeries" are different. Pet. 16. Petitioner conflates the *Skrmetti* majority's Equal Protection analysis of a state legislative "ban of certain medical treatments for minors with gender dysphoria" with an unwritten Medicaid exclusion policy banning treatment of gender dysphoria for adults. Petitioner's framing of the question strays well beyond the limited holding of the *Skrmetti* majority.

The *Skrmetti* majority expressly distinguished its Equal Protection analysis on the role of a state's legislature in the regulation of medical treatments of children before reaching adulthood. *Skrmetti,* 83 F.4th at 468 ("Many surgical treatments initially

restricted to adults have become available to minors in the past six years, often without any prerequisites for therapy or cross-sex hormone treatments.") (citation omitted).[1] Unlike *Skrmetti*, the Medicaid Exclusion Policy considered by the district court for purposes of qualified immunity at the motion to dismiss stage was not the product of legislative action. The Tennessee and Kentucky legislatures' findings supporting regulation of medical treatments for minors is not applicable for purposes of this appeal.

In *Skrmetti*, the statutes being reviewed are different then the Medicaid Exclusion in this appeal. Tennessee did not restrict any of the banned medical procedures for persons over 18. *Id.* at 46-69 (citing Tenn. Code §68-33102(6)). Kentucky did not restrict the prohibited treatment options for individuals over 17. *Skrmetti,* 83 F.4th at 470 (citing Ky. Rev. Stat. Ann. § 311.372(1)(a)). The Medicaid Exclusion Policy banned medically necessary treatment of gender dysphoria to a relatively small segment of adult and child beneficiaries who relied on Medicaid to cover and reimbursement their care. Adult transgender individuals in Idaho with private insurance, including Idaho state employees, continue to access medically necessary treatment of their diagnosed gender dysphoria.

Petitioner fails to disclose that "sex-reassignment surgeries" for minors was not an issue in *Skrmetti*. The district court in Tennessee "concluded that the challengers lacked standing to contest the ban on

[1] The court noted the percentage of youth identifying as transgender had doubled in the past few years while the percentage of adults had remained constant. *Id.* at 468.

surgeries but could challenge the ban on hormones and puberty blockers." *Skrmetti,* 83 F.4th at 469. The Kentucky plaintiffs "challenged the Act's ban on puberty blockers and hormone therapy, but they did not challenge its regulation of surgical procedures." *Id.* at 470. Petitioner's request to hold the Petition until *Skrmetti* is decided is not necessary. The Ninth Circuit's denial of qualified immunity was without prejudice. Pet. App. 6a. The Ninth Circuit acknowledged the trial court could consider the qualified immunity defense on a fully developed record and address the applicable Equal Protection principles. *Id.* at 4a n.2 & 6a.

The *Skrmetti* majority recognized the regulation of medical treatments for minors differs from adults under Equal Protection. "A key distinction in the laws turns on age. Adults may use drugs and surgery to transition from one gender to another. But children may not. That classification is eminently reasonable and does not trigger heightened review." *Id.* at 480. The Court found "[t]his distinction readily satisfies the deferential review that applies to age-based classifications." *Id.* The court also found a second distinction. The law "turns on the medical condition at issue: gender dysphoria" and to delay treatment "until the patient reaches 18." *Id.* "This reasonable approach—waiting to use potentially irreversible treatments until the child becomes an adult—also satisfies the deferential review that applies in this setting. A state may reasonably conclude that a treatment is safe when used for one purpose but risky when used for another, especially when, as here, the treatment is being put to a relatively new use." *Id.* (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46, (1985); *Bd. of Trs. of Univ. of Ala. v.*

Garrett, 531 U.S. 356, 369-70 (2001). The two *Skrmetti* distinctions based upon age and a delay until a minor reaches adulthood at 18 years are not presented in this appeal.

Petitioner fundamentally mischaracterizes the factual and legal differences in the questions presented in *Skrmetti* and this appeal.[2] The majority found "an across-the-board regulation lacks any of the hallmarks of sex discrimination." *Skrmetti,* 83 F.4th at 480. The majority reasoned: "By guarding against the risks of physically invasive, often irreversible, changes to a child's secondary sex characteristics until the individual becomes an adult, the law does not trigger any traditional equal-protection concerns. And by limiting access to sex-transition treatments to 'all' children, the bans do not 'constitute[] a denial of the equal protection of the laws...'" *Id.* There thus is no reason to apply skeptical, rigorous, or any other form of heightened review to these laws." *Id.* at 480-81. (citing *Geduldig v. Aiello*, 417 U.S. 484, 496-97 (1974) (cleaned up).

[2] The recent Idaho statutes prohibiting Medicaid coverage and funding Gender Transition procedures actually shows the intent to target and discriminate based on sex and transgender status. Pet. 17 n.6. Idaho Code § 56-270 and § 18-8901 (NO PUBLIC FUNDS FOR GENDER TRANSISTION). The prohibitions not only exempt treatments for cisgender persons but also exempts treatments "caused or exacerbated by the performance of gender transition procedure" regardless of a gender dysphoria diagnosis. Idaho Code § 18-8901(1)(b).

B. *Geduldig* Does Not Support Granting Review In This Appeal

The Ninth Circuit's application of *Geduldig* does not support granting review of the denial of qualified immunity without prejudice. In *Geduldig*, the pregnancy exclusion did not solely impact women because the program had two groups, pregnant women and nonpregnant persons which included both sexes. *Geduldig,* 417 U.S. at 496 n.20. The policy's fiscal benefits accrued to members of both sexes. *Id.* The Court concluded "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect invidious discrimination, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation..." *Id.* While pregnancy was not a sufficiently close proxy for sex, *Geduldig* did not hold that a diagnosis, outside the pregnancy context, which is solely characteristic of a discrete group, cannot be a proxy for that group.

The district court found at this stage, based upon the factual allegations taken as true and the inference therefrom, "exclusively transgender persons – and not cisgender persons – suffer from gender dysphoria." [3] Pet. App. 33a. The district court found, unlike in *Skrmetti*, the disparate impact between transgender and cisgender persons "falls squarely within *Geduldig* pretext exception." Pet. App. 34a-35a. Alternatively, the district court found the "Complaint plausibly supports a claim of facial gender discrimination." Pet. App. 35a. "[T]he exclusion [of gender-affirming care]

[3] *See:* The DSM-V TR definition of gender dysphoria requires that an individual identify as transgender to qualify for a gender dysphoria diagnosis. Pet. App. 60a.

precludes a specific treatment that is connected to a person's sex and gender identity – not just a single objectively identifiable physical condition with unique characteristics." Pet. App. 36a (quoting *Fain v. Crouch*, 618 F. Supp. 3d 313, 327 (S.D.W.V. 2022) (internal quotation marks and citations omitted) (affirmed *Kadel v. Folwell*, 100 F.4th 122, 146-47 (4th Cir. 2024) (Petition for Certiorari filed 07/25/2024).

The Medicaid Exclusion Policy does not regulate the treatment of gender dysphoria. It only regulates transgender individuals who are Medicaid beneficiaries. Excluding treatment of gender dysphoria which addresses the clinical distress caused by the incongruity between a transgender person's sex assigned at birth and gender identity, is a proxy for transgender status. While cisgender Medicaid beneficiaries can receive the same surgeries for other medical conditions, the exclusion for "sex-reassignment surgeries" to treat gender dysphoria cannot be applied without classifying a transgender person on the basis of sex assigned at birth. The Ninth Circuit found this case was "distinct from *Geduldig* where no sex was comparably disadvantaged" because the Petitioner "conceded at oral argument, by singling out gender dysphoria as the only non-covered condition, the policy exclusively burdens transgender beneficiaries relative to cisgender beneficiaries, regardless of individual circumstances or medical necessity." Pet. App. 5a. This distinguishes the pregnancy exclusion in *Geduldig* which did not exclusively burden women or men and did not require an inquiry into the characteristics of a person's sex. Unlike *Geduldig*, in order to know whether a treatment is prohibited by the Medicaid Exclusion, one must know the sex assigned at birth to determine

if the Medicaid beneficiary is a transgender or cisgender individual.

The Medicaid Exclusion is not limited to one sex or another but imposes differential treatment based upon an individual's sex assigned at birth to define which treatments are prohibited and which treatments are permitted so *Geduldig* and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 236 (2022) are not implicated. It "unavoidably discriminates against a person with one sex identified at birth and another today." *Bostock v. Clayton County*, 590 U.S. 644, 659, 669 (2020). *Dobbs* does not protect the Medicaid Exclusion from heightened scrutiny if it is a pretext for and was "designed to effect an invidious discrimination" against transgender beneficiaries. *Dobbs*, 597 U.S. at 236.

C. Gender Dysphoria Is A Proxy For Discrimination

The factual and medical allegations, accepted as true, establish that the prohibition of "sex-reassignment surgery" targets all transgender persons for the purpose of denying surgeries to address the clinical distress caused by the incongruity between a transgender person's sex assigned at birth and gender identity because it was considered "cosmetic" only for transgender beneficiaries. Gender dysphoria is a serious medical condition recognized by the American Psychiatric Association's DSM-V TR. Pet. App. 60a. Untreated gender dysphoria can cause anxiety, depression, self-harm, or suicidal ideation. Pet. App. 61a. Untreated gender dysphoria intensifies over time and present a greater risk of harm. *Id.*

A cisgender person will not suffer the debilitating effects of gender dysphoria and would not seek, or medically require, "sex-reassignment surgery." Petitioner's unsupported assertion that the exclusion is "entirely agnostic" because no man, women, or transgender person receives coverage obscures the medical fact that "sex-reassignment surgery" would never be medically necessary for a cisgender person who could not be diagnosed with gender dysphoria. Pet. App. 10. The Governor's letter is indisputable evidence that the policy sought to discriminate on the basis of sex against transgender Medicaid beneficiaries. Dkt. 33-1. The concocted "diagnosis" justification confirms the exclusion is "a mere pretext designed to effect an invidious discrimination" against all transgender Medicaid beneficiaries which *Geduldig* prohibits. *Geduldig*, 417 U.S. at 496 n.20.

Petitioner dismisses this Court's admonition in *Geduldig* that pretexts designed to effect invidious discrimination are subject to heightened scrutiny. *Id.* Petitioner inexplicitly asserts there is no pretext because there is "no evidence of animus here" or "subjective evidence of animus" and the policy does not otherwise target "'a particular class of people'" like a tax on Jews for wearing yarmulkas. (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993)). Pet. 12. The Medicaid Exclusion targets gender dysphoria by classifying treatments for transgender persons because it changes their appearance, the same as targeting Jews for their appearance with yarmulkas.

Petitioner asserts that the Ninth Circuit's application of *Geduldig* "makes no sense" and "is bizarre" comparing it to an "health-insurance exclusion removing coverage for a treatment that only individuals self-identifying as transgender are likely to seek." Pet. 13. The Ninth Circuit's "bizarre" analysis was adopted by the Fourth Circuit's en banc opinion holding North Carolina State Health Plan's coverage exclusion and West Virgina's Medicaid surgical exclusion that "discriminat[ed] on the basis of diagnosis is discriminating on the basis of gender identity and sex" and "cannot meet heightened scrutiny." *Kadel v. Folwell*, 100 F.4th 122, 141-42 & 146-47 (4th Cir. 2024) (en banc) (Petition for certiorari filed at, 07/25/2024). The Fourth Circuit held "*Geduldig* is best understood as standing for the simple proposition that pregnancy is an insufficiently close proxy for sex. The same cannot be said for the inextricable categories of gender dysphoria and transgender status." *Id.* at 146.

Kadel held much like Jews wearing yarmulkas that "gender dysphoria is so intimately related to transgender status as to be virtually indistinguishable from it and the exclusions cannot function without relying on direct—not just proxy-based—discrimination." *Id.* at 146. *Kadel* recognized the pregnancy exclusion in *Geduldig* did not "require inquiry into a person's sex assigned at birth." *Id.* In contrast, transsexual surgery cannot be done "without inquiry into a patient's sex assigned at birth and comparing it to their gender identity." *Id.* at 146-47. *Kadel* rejected Petitioner's argument "that gender dysphoria is not being used as a proxy for transgender identity here because treatment for that diagnosis is not covered for anyone, transgender or cisgender." *Id.*

at 147. This is like asserting a tax on wearing yarmulkas is neutral because it applies to everyone. The Court rejected this argument because "'[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.'" *Id.* (quoting *City of Los Angeles v. Patel*, 576 U.S. 409, 418 (2015)) (quotations omitted). Petitioner's reliance on the dissenting opinion in *Kadel* does not justify delaying or granting review until *Skrmetti* is decided. Pet. 12 & 14.

Health insurance cannot discriminate against a person who is diagnosed with gender dysphoria by excluding coverage of "sex change surgery and drugs." *Lange v. Hous. Cnty.*, 608 F. Supp. 3d 1340, 1358 (M.D. Ga. 2022).[4] That qualification, however, is immaterial to the question of whether the Exclusion is facially discriminatory." *Id.* "[F]or example, that the plan pays for mastectomies when medically necessary for cancer treatment but not when mastectomies are medically necessary for sex change surgery." "The undisputed, ultimate point is that the Exclusion applies only to transgender members, and it applies to Lange because she is transgender." *Id.*[5]

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[4] The 11th Circuit's decision *Lange* as cited by Petitioner, is pending an en banc review. *Lange v. Hous. Cty.*, 110 F.4th 1254 (11th Cir. 2024).

[5] *Kadel* similarly recognized that: "[j]ust as cisgender people would not seek any treatment for gender dysphoria, they would not seek certain surgeries for gender-affirming purposes. For instance, a cisgender woman would never seek a hysterectomy, oophorectomy, or vaginectomy for gender-affirming reasons because, for her, those surgeries are not gender-affirming. Nor would a cisgender man ever seek an orchiectomy or penectomy for gender-affirming reasons because, for him, those surgeries are not gender-affirming." *Kadel*, 100 F.4th at 149.

Petitioner ignores actual and subjective evidence of animus. Respondents' physicians submitted unrefuted evidence of the medial necessary for the treatment of gender dysphoria. Pet. App. 53a-54a, 74a-76a, 84a-87a. Petitioner was presumably aware, as the physician Medicaid medical director, of the symptoms of untreated gender dysphoria as confirmed in the medical records. Pet. App. 82a. "Plaintiffs alleged that Dr. Hamso denied Medicaid coverage for medically necessary surgeries based upon their transgender status under an unwritten policy that deems such surgeries as 'cosmetic' specifically when treating gender dysphoria, even though Dr. Hamso grants coverage for the same surgeries when treating all other medical conditions 'as a matter of course.'" Pet. App. 2a.

The Governor's subsequent clarification of Medicaid's unwritten exclusion policy was issued after he became aware the Petitioner was "currently being sued for having not pre-authorized Medicaid coverage for the sex reassignment surgeries of two young adults." Dkt. 33-1. The Governor's reference to "sex-reassignment surgeries" to change the appearance" targets individuals on the basis of sex and transgender status. *Id.* Petitioner's concession at oral argument is further evidence of animus because she was aware that, "by singling out gender dysphoria as the only non-covered condition, the policy exclusively burdens transgender beneficiaries relative to cisgender beneficiaries, regardless of individual circumstances or medical necessity." Pet. App. 5a. "Plaintiffs' coverage requests have been denied outright or effectively denied as the

requests have been perpetually 'under review.'" Pet. App. 2a.

Petitioner concedes that "*everyone* denied coverage for sex-reassignment surgeries used to treat gender dysphoria 'is transgender,' for purposes of the Equal Protection analysis." Pet.11 n.5 (emphasis in original). Petitioner seeks to avoid the significance of indisputable fact by interjecting new facts and unmoored expert opinions which are outside the scope of the interlocutory appeal on the denial of qualified immunity. Pet. 10-11. Petitioner's contentions that "Medicaid participants who seek coverage for sex-reassignment surgery to treat gender dysphoria may self- identify as transgender" or the "concept of 'being transgender' is multifarious" appear out of thin air in an effort to justify the discrimination. Pet. 11.

Petitioner cannot hypothesize new facts and opinions that fit their views of transgender persons for the first time in this appeal. This Court should reject Petitioner's attempt to transform its role on an interlocutory appeal into a trier of fact. The Court should also reject post hac justifications for the discriminatory exclusion policy. The district court will have an opportunity based upon a developed record to consider Petitioner's justifications and evidence.

D. Heightened Scrutiny Applies to the Medicaid Exclusion Policy

Petitioner asserts the "Ninth Circuit was wrong to hold heightened scrutiny applies" to the Medicaid Exclusion Policy. Pet. 7. Petitioner contends the denial of "sex-reassignment surgeries" is subject to

rational basis review because the treatment "turns solely on the diagnosis for which it is sought . . . even if it disparately impacts males, females, or transgender individuals" Pet. 7. The exclusion does not explicitly reference the condition of gender dysphoria but only reference "sex-reassignment surgeries" to solely target transgender individuals with gender dysphoria. The Governor's subsequent clarification of the policy targeted Respondents after he became aware Petitioner was "currently being sued for having not pre-authorized Medicaid coverage for the sex reassignment surgeries of two young adults." Dkt. 33-1.

The Equal Protection Clause requires courts to apply heightened standard of review to classification based upon sex and gender. *United States v. Virginia* (*VMI*), 518 U.S. 515, 533 (1996). This Court has held that that "all gender based classifications" must be subjected to "heightened scrutiny." *Id.* at 555 (citation omitted). Classification based upon sex "generally provides no sensible ground for differential treatment." *City of Cleburne*, 473 U.S. at 440. "Today, laws of this kind are subject to review under the heightened scrutiny that now attends 'all gender-based classifications.'" *Sessions v. Morales-Santana*, 582 U.S. 47, 69-70 (2017) (citing *J. E. B. v. Alabama ex rel. T. B.*, 511 U. S. 127, 136 (1994). Sex-based policies often reflect stereotypes or "overbroad generalizations about the different talents, capacities, or preferences of males and females," *VMI*, 518 U.S. at 533. This Court has confirmed that if the government treats differently "a person identified as male at birth for traits or actions that it tolerates in a[] [person] identified as female at birth," or vice versa, the person's "sex plays an unmistakable . . .

role." *Bostock v. Clayton Cnty.*, 590 U.S. at 660. "A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985).

A party "that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification.'" *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461, (1981)). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *VMI*, 518 U.S. at 533. "[T]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975).

The burden justifying differences on the basis of gender is only met by "show[ing] 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Sessions,* 582 U.S. at 59 (quoting *VMI*, 518 U.S. at 533) (quoting *Hogan*, 458 U.S. at 724; alteration in original). The Court should not grant review because, at the motion to dismiss stage, there is no evidence, much less an exceedingly persuasive justification, for the exclusion's sex and gender discrimination and whether "the means employed are substantially related to the achievement of those objectives." *Sessions*, 582 U.S. at 59. Petitioner fails to offer any

important legitimate governmental objectives or persuasive justification for the sex discrimination which supports Medicaid's exclusion of treatment of gender dysphoria. *Cf. Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (Petitioner "conflates the classifications drawn by the law with the state's justification for it.").

The Medicaid Exclusion on its face creates sex-based classifications by prohibiting transgender Medicaid beneficiaries, but not cisgender Medicaid beneficiaries, from receiving medical treatments if the "sex-reassignment surgeries, puberty blockers, or hormones for the purpose of changing the appearance any child's and adult's sex." Dkt. 33-1. The Medicaid Exclusion Policy conditions the availability of treatment on the beneficiary's sex determined at birth and conformity with societal expectations clearly associated with the with their sex assigned at birth if, regardless of medical necessity, the treatment will change the appearance of the beneficiary. This is a facial classification. *Cf. Bostock*, 590 U.S. at 659 & 661 (A policy facially discriminates based upon sex "if changing the employee's sex would have yielded a different choice by the employer," even if "other factors contribute to the decision."). Unlike *Skrmetti*, the policy does not a regulate medical treatment of all minors regardless of sex because it only bans transgender Medicaid beneficiaries from receiving treatment. The exclusion expressly references the transgender plaintiffs and sex and gender by prohibiting "sex-reassignment surgeries" for the purpose of changing the appearance of a beneficiary's sex assigned at birth to conform to sexual stereotypes.

The Ninth Circuit found "[a]s alleged, the policy of treating certain surgeries as 'cosmetic' only when treating gender dysphoria creates a classification on the basis of transgender status and sex, which was clearly subject to heightened scrutiny under binding circuit precedent." Pet. App. 5a. (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019)). In *Karnoski*, the Ninth Circuit determined a "2018 policy regulates on the basis of transgender status. It stated that "'*Transgender persons* with a history of gender dysphoria are disqualified from military service,' and 'that *Transgender persons* without a history or diagnosis of gender dysphoria ... may serve ... in their biological sex.'" *Karnoski*, 926 F.3d at 1201 (emphasis in original).[6] The Court held "the 2018 policy on its face treats transgender persons differently than other persons, and consequently something more than rational basis but less than strict scrutiny applies." *Id.*

The Medicaid Exclusion similarly regulates and more broadly disqualifies all transgender persons with a history of gender dysphoria from Medicaid services. The Medicaid Exclusion cannot avoid heightened scrutiny on the pretext it includes transgender persons who need treatment of gender dysphoria and males and females who have no need to receive medical treatment of gender dysphoria. "But a law is not immune to an equal protection challenge if it discriminates only against some members of a

[6] In *Karnoski*, the Ninth Circuit rejected the argument that a policy was not discriminatory because "[e]ven assuming that subset exists, the policy indisputably bars many transgender persons from military service." *Id.* at 1099 n.15.

protected class but not others." *Hecox v. Little*, 2024 U.S. App. LEXIS 13929 *34-35 (9th Cir. 2024) (Amended Opinion) (citing *Mathews v. Lucas*, 427 U.S. 495 (1976) ("That the statutory classifications challenged here discriminate among illegitimate children does not mean, of course, that they are not also properly described as discriminating between legitimate and illegitimate children.")

The text of the Medicaid Exclusion Policy expressly and exclusively targets transgender individuals whose gender identity does not align with their sex assigned at birth. The clinical distress caused by this incongruity between a transgender individual's sex assigned at birth and gender identity is the medical basis for the diagnosis of gender dysphoria. The Medicaid Exclusion's application by its terms depends on the person's sex assigned at birth. It provides different treatment on the basis of sex. A transgender female assigned male at birth is prohibited from receiving the same treatments that would permit her to live as a female because it is for the "purpose of changing the appearance" of her sex assigned at birth. However, a female whose sex was assigned at birth is not excluded from receiving the same treatment for purposes other than gender dysphoria.

The Medicaid Exclusion Policy is not neutral because it explicitly classifies by prohibiting transgender beneficiaries' treatments on the basis of sex as "cosmetic," gender-nonconforming behavior, gender identity, or transgender status. Because the exclusion's prohibitions "cannot be stated without referencing sex," they are "inherently based upon a sex-classification." *Whitaker v. Kenosha Unified Sch.*

Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017), cert. dismissed, 583 U.S. 1165 (2018). The *Skrmetti* majority held this Court's decision in *Bostock* only applied to Title VII but there was no explanation "why or how any difference in language" in the Equal Protection Clause "requires different standards for determining whether a facial classification exists in the first instance." *Skrmetti*, 83 F.4th at 484-85.

Bostock's basic principles are not the product of the different text. Title VII forbids sex or gender based discrimination, unless a certain defense can be made, while Equal Protection allows discrimination if the classification satisfies heightened scrutiny. There is no rationale for distinguishing between a transgender employee and Medicaid beneficiary in applying the Court's finding that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex" because sex plays an "unmistakable" role when a person is "penalize[d]" for "traits or actions" that would be tolerated in someone assigned the opposite sex at birth, *Bostock*, 590 U.S. at 660. This is not a novel or new legal understanding. *See Kasti v. Maricopa Cty. Comm. College*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) ("it is unlawful to discriminate against a transgender (or any other person because he or she does not behave in accordance with an employer's expectations for men and women.") (Honorable Neil M. Gorsuch, Circuit Judge for the Tenth Circuit, sitting by designation.)

E. The Denial of Qualified Immunity Does Not Conflict With This Court's Precedents and Existing Cases Provided Petitioner With Notice and Fair Warning

Petitioner revealingly limits the discussion of the Ninth Circuit's and this Court's qualified immunity precedents to distinguishable Fourth Amendment caselaw. Pet. 19 n7. Petitioner relies upon cases involving police officers responding to a "perilous situation" who "are often forced to make split second judgments." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 612-13 (2015). This Court recognized "'specificity is especially import in the Fourth Amendment context … Use of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue.'" *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12-13 (2015)) (per curiam) (cleaned up). *See also Brosseau v. Haugen*, 543 U.S. 194, 197 (2004) ("qualified immunity operates 'to protect officers from the sometimes hazy border between excessive and acceptable force'") (quoting *Saucier v. Katz*, 533 U.S. 196, 206 (2001)) (cleaned up). The Ninth Circuit recognized classifications on the basis of sex and the obvious constitutional right not to inflict facial or by proxy discrimination is not a "hazy border" at this time.

This Court has recognized: "[o]f course, in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law." *Id.*

at 201 (citing *Hope v. Pelzer*, 536 U.S. 730, 738, (2002)) ("where the Eighth Amendment violation was 'obvious' that there need not be a materially similar case for the right to be clearly established"). *See Taylor v. Riojas*, 592 U.S. 7, 9 (2022) (*Hope* explained that: "'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question'") (quoting *United States v. Lanier*, 520 U.S. 259, 271(1997)). The law need not be a "precise formulation of the standard" as long as "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

The Court in *Ashcroft v. al-Kidd* found the contours of constitutional question was not clearly established because "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). In 1974, *Geduldig* held that policy distinctions which are mere pretexts designed to effect invidious discrimination on the basis of sex are unconstitutional. *Geduldig*, 417 U.S. at 496 n.20. The statutory and constitutional caselaw under the Medicaid Act and Equal Protection provided notice to Petitioner that her conduct was subject to heightened scrutiny

The Ninth Circuit affirmed at the motion to dismiss stage the denial of qualified immunity after accepting the factual allegations of the compliant as true and viewing them in the light most favorable to

Respondents. Pet. App. 3a-5a. *See Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014) (Per Curim) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."). The Ninth Circuit found the "'issue is a purely legal one: whether the facts alleged [by the plaintiff] support a claim of violation of clearly established law.'" Pet. App. 3a. The Court held it "'need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.'" *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

The Ninth Circuit found "[d]ismissal is not appropriate unless it is clear from the face of the complaint that qualified immunity applies." Pet. App. 3a. (citation omitted). The Ninth Circuit found "[a]s alleged, the policy of treating certain surgeries as 'cosmetic' only when treating gender dysphoria creates a classification on the basis of transgender status and sex, which was clearly subject to heightened scrutiny under binding circuit precedent." *Id.* at 5 (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019).

The Ninth Circuit was persuaded by Dr. Hamso's concession at oral argument that she was aware, "by singling out gender dysphoria as the only non-covered condition, the policy exclusively burdens transgender beneficiaries relative to cisgender beneficiaries, regardless of individual circumstances or medical necessity." Pet. App. at 5a. Based upon Ninth Circuit case precedent "Dr. Hamso had sufficient notice that the policy created a classification that would be

subject to heightened scrutiny." *Id.* (citing *Karnoski*, 926 F.3d at 1200-01). In *Karnoski*, the Ninth Circuit concluded if a "[p]olicy on its face treats transgender persons differently than other persons, . . . consequently something more than rational basis but less than strict scrutiny applies." *Id.*, 926 F.3d at 1201. *See also Doe v. Snyder*, 28 F.4th 103, 113 n.5 (9th Cir. 2022) (quoting *Karnoski* on the level of scrutiny applicable to the sex and transgender status).

The Ninth Circuit held "Dr. Hamso violated the transgender Plaintiffs' clearly established right to be treated equally to other, non-transgender Medicaid beneficiaries when seeking Medicaid coverage for the same medically necessary surgeries." Pet. App. 5a. The Ninth Circuit determined Dr. Hamso had fair warning "at the time of Dr. Hamso coverage denials a robust consensus of district court decision evaluating the same or similar exclusionary policies across the country also put her on notice of Plaintiffs' Equal Protection rights in the healthcare coverage context." Pet. 5a. Petitioner does not address the district court decisions which provided fair warnings Dr. Hamso. Instead, Petitioner asserts cases entirely premised on a legislature's regulation the medical care for minors that falls victim to a high level of generality.

The Ninth Circuit cited to examples of cases in "healthcare coverage context" that found exclusion of gender-affirming treatment unconstitutional or in violation of the Medicaid Act. Pet. 5-6 (citing *Fain v. Crouch*, 618 F. Supp. 3d 313, 327-30 (W. Va. 2022) (enjoining West Virginia Medicaid exclusion as violative of Equal Protection) (affirmed *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (*en banc*); *Flack*

v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 951-53 (W.D. Wis. 2018) (enjoining Wisconsin's Medicaid exclusion).

There are many other case examples including: *Kadel v. Folwell,* 620 F. Supp. 3d 329 (M.D.N.C. 2022) (North Carolina state health insurance exclusion of surgeries for transgender individuals with gender dysphoria facially discriminated based on sex and transgender status under intermediate scrutiny.) (affirmed *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024) (*en banc*); *Toomey v. Arizona*, 2019 U.S. Dist. LEXIS 219781 (D. Ariz. Dec. 23, 2019) (state health insurance excluded gender reassignment surgery violated Equal Protection. "[T]ransgender individuals are the only people who would ever seek gender reassignment surgery. No cisgender person would seek, or medically require, gender reassignment."); *Boyden v. Conlin,* 341 F.Supp.3d 979 (W.D. Wis. 2018) (same); *Prescott v. Rady Child.'s Hosp.-San Diego,* 265 F.Supp.3d 1090 (S.D. CA. 2017) (same); *Fletcher v. Alaska,* 443 F. Supp. 3d 1024, 1030 (D. Alaska 2020) (same); and *C.P. by and through Pritchard v. Blue Cross Blue Shield,* 536 F.Supp.3d 791 (W.D. Wash. 2021) (same); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119-1120 (N.D. Cal. 2015) (discrimination based on transgender status by not providing sex reassignment surgery to treat gender dysphoria under Equal Protection).

Other cases have determined the exclusion of gender affirming surgeries violate the Medicaid Act. *See Cruz v. Zucker*, 195 F. Supp. 3d 554, 576-77 (S.D.N.Y. 2016) reconsideration granted on other grounds, 218 F. Supp. 3d 246 (S.D.N.Y. 2016)) (covering surgeries but

categorically excluding those same surgeries when necessary to treat gender dysphoria); *Pinneke v. Pressier,* 623 F.2d 546 (8th Cir. 1980) (affirming the award of damages because Iowa Medicaid's exclusion of "sex reassignment surgery violated the Medicaid Act"); and *Doe v. Minnesota Dep't of Pub. Welfare and Hennepin Cnty Welfare Bd.*, 257 N.W.2d 816, 820 (Minn.1977)) (The exclusion of transsexual surgery as medically unnecessary is void under Medicaid Act.).

There is no reason for the Court to delay or grant review because the denial of qualified immunity was "without prejudice" and Petitioner may "assert it again with a more developed record." Pet. App. 6a. Petitioner did not petition for rehearing or rehearing *en banc* of the denial of qualified immunity or to overturn the *Karnoski* decision. The district court can consider *Skrmetti* on a developed record.

F. The Petitioner's Circuit Conflicts Are Misleading And Exaggerated

The Ninth Circuit's decision affirming the denial of qualified immunity without prejudice at the motion to dismiss was narrow and not final. Pet. App. 6a. Petitioner's ad hominem attack on the Ninth Circuit's judges devalues the role of the judiciary and ignores the panel's decision to grant Petitioner qualified immunity on the procedural Due Process claim. *Id.* The Ninth Circuit's decision does not conflict with the Circuit cases relied upon by Petitioner because they only concern legislative bans applicable to minors. This appeal concerns a discrete population of adult transgender Medicaid beneficiaries who are protected from discrimination on the basis of sex and

transgender status clearly established by statutory and constitutional safeguards from a post ad hoc policy directed to thwart medically necessary treatment for transgender Medicaid beneficiaries suffering from gender dysphoria.

Petitioner hypothesizes the Court should hold the Petition until it is decided or grant certiorari because the denial of the preliminary injunction in "*Skrmetti*, by itself, already demonstrates the law was not clearly established" and "the Equal Protection question in *Skrmetti* is materially identical to the one presented here-- …" Pet. 19.[7] Petitioner disregards *Skrmetti's* "key distinction in the laws turns on age. Adults may use drugs and surgery to transition from one gender to another. But children may not. That classification is eminently reasonable and does not trigger heightened review." *Skrmetti*, 83 F.4th at 480. *Skrmetti* is based upon an entirely different set of facts regarding a state's legislative regulation of medical treatments for minors which does not include the surgeries at issue in this appeal. *Skrmetti* distinguished between minors and adults. *Id.* at 480-81. ("By guarding against the risks of physically invasive, often irreversible, changes to a child's secondary sex characteristics until the individual becomes an adult, the law does not trigger any traditional equal-protection concerns."). The Ninth Circuit in *Doe v. Snyder* recognized cases involving minors and adults who are transgender as "factually distinct." *Id.*, 28 F.4th 103, 113 n.5 (9th Cir. 2022).

[7] Petition does not reference or cite to the Sixth Circuit's *Skrmetti* decision under review. Pet. viii.

There is no reason to hold the Petition because the denial of qualified immunity was without prejudice so it can be raised on summary judgment on a more developed record.

Petitioner suggestion there is a circuit split between three Circuits upholding statewide regulation of access to medical procedures for minors, including *Skrmetti*, is premised on a mischaracterization of the Ninth Circuit's decision. Pet. 20. Petitioner does not point to a genuine circuit split or an actual holding in a single case which addresses an exclusion policy prohibiting adult Medicaid beneficiaries from receiving "sex-reassignment surgeries" for the medically necessary treatment of gender dysphoria which Petitioner conceded was a proxy for discrimination on the basis of sex and transgender status. Pet. App. 5a. The presence of undiscovered and undeveloped facts counsels against an interlocutory review at the motion to dismiss stage.

Petitioner resorts to creating conflicts by counting the number of circuit judges in the majority in cases involving regulation of medical treatments for minors. Pet. 19 n.9. Petitioner exclusively relies on a highly speculative assertion of how *Skrmetti* will be decided by this Court. Granting the Petition without a developed record is unwarranted and premature. The Court should not depart from its traditional criteria for certiorari by not granting review of an interlocutory appeal absent any conflict based on speculation and conjecture on the outcome of *Skrmetti*. Recent circuit decisions regarding discrimination on the basis of sex and transgender status supports the Ninth Circuits decision and the

denial of the Petition. *See Hecox v. Little*, 2024 U.S. App. LEXIS *13929 (9th Cir. June 7, 2024) (Amended Opinion); *Kadel v. Folwell*, 100 F.4th 122 (4th Cir. April 29, 2024) (*en banc*) (Petition for certiorari filed at, 07/25/2024).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted

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