No. 24-631

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY

There is no meaningful way to distinguish this petition from *United States v. Skrmetti*, No. 23-477. Respondents throw up every difference they can find between the two cases: hormones vs. surgeries, minors vs. adults, statute vs. agency policy. But not one of those differences matters to the question at issue—i.e., whether a denial of coverage for sex-reassignment treatments classifies based on sex or transgender status—and not one of them can distinguish this case from the Court's upcoming decision in *Skrmetti*.

The Court should therefore hold this petition pending *Skrmetti*, then dispose of it as appropriate in light of that decision. If the Court agrees that regulating access to gender dysphoria treatment "is not a sex-based classification," but instead is merely "[t]he regulation of a medical procedure that only one sex can undergo," *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022), then it should GVR the Ninth Circuit's decision.

In all events, the Court should summarily reverse the Ninth Circuit's egregious holding that the law was "clearly established" for purposes of qualified immunity. Respondents dispute whether a grant of certiorari in *Skrmetti* means the governing law in this case was unsettled (it does), but they never deny that numerous judges addressing Medicaid exclusions *just like* the alleged policy here have disagreed with the Ninth Circuit. And "if judges [] disagree on a constitutional question, it is unfair to subject [officers] to money damages" by denying qualified immunity. *Reichle v. Howards*, 566 U.S. 658, 670 (2012).

ARGUMENT

I. This Petition Should Be Held Pending the Court's Decision in *Skrmetti*.

The question presented by this petition is conceptually indistinguishable from the question presented in *Skrmetti*—does the regulation of a sex-reassignment treatment facially discriminate on the basis of sex or transgender status under the Equal Protection Clause? *Skrmetti*'s answer to that question will dictate whether the Ninth Circuit's answer was correct, so the Court should hold this petition pending *Skrmetti*. *See Folwell v. Kadel*, No. 24-99 (pending petition for certiorari raising identical issue as this petition has not yet been denied).

1. Respondents note (at 10–13) three differences between the statute in *Skrmetti* and the alleged Medicaid policy here, but none of those differences affects the question of facial discrimination.

Treatment. Respondents observe that *Skrmetti* will address only the Tennessee statute's ban on *hormones* to treat gender dysphoria, while Idaho's alleged policy denies Medicaid coverage for *surgeries* to treat gender dysphoria. But the question of facial classification—which is the question the Ninth Circuit addressed, App.4a–5a—is the same in both cases. Indeed, after noting this distinction, Respondents do not even try to explain how the analysis would be any different for hormones.

Regulations of hormones and surgeries for gender dysphoria treatment classify in the same way. In both cases, applying the regulation turns on the treatment sought and the diagnosis to be treated. And in both cases, those denied the treatment (or

coverage for the treatment) will be members exclusively of one sex or the other—for example, only natal men will be denied estrogen or coverage for penectomies to treat gender dysphoria.

That's not a sex-based classification, but merely the "regulation of a medical procedure that only one sex can undergo." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022). "Using testosterone or estrogen to treat gender dysphoria . . . is a different procedure from using testosterone or estrogen to treat, say, Kleinfelter [*sic*] Syndrome or Turner Syndrome." *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 481 (6th Cir. 2023); Pet. 14 (differences in surgeries performed on natal males and females). So the only way an Equal Protection claim can succeed is to prove that the regulations are "mere pretexts designed to effect an invidious discrimination against the members of one sex or the other"—a question the Ninth Circuit never reached. *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

Regardless, because the prohibition on hormones and denial of coverage for surgeries classify in the same way, they will rise or fall together on the question of whether there is facial discrimination.

Age. Respondents also note that the law in *Skrmetti* applies only to minors, while Idaho's alleged policy denies Medicaid coverage to adults too. But that distinction bears only on the state's *justification* for the regulation (under rational basis or heightened scrutiny), which is not at issue in this appeal. *See Skrmetti*, 83 F.4th at 488 (considering age to assess the state's justification). The question of *classification* based on sex or transgender status is unaltered by the age of the individual. Pet. 16–17.

Nothing in the Sixth Circuit's *Skrmetti* opinion suggests otherwise. Respondents repeatedly quote (at 2, 12, 34) the court's statement that a "key distinction in the laws turns on age," 83 F.4th at 480, but the court made that statement in the course of rejecting an Equal Protection argument *based on age-based classification*, not sex-based classification.

Policy. Respondents draw one final distinction—*Skrmetti* involves a *statute*, while Idaho is alleged to have only an agency-made *policy*.[1] Respondents never explain why this is significant—"[t]here is a long tradition of permitting *state governments*," not just state legislatures, "to regulate medical treatments for adults and children." *Skrmetti*, 83 F.4th at 474 (emphasis added); *Beal v. Doe*, 432 U.S. 438, 444 (1977) (Medicaid). And the regulation's origin, whether in statute or policy, doesn't change how it classifies in application.

2. In their response on the merits (at 14–27), Respondents include three more reasons they believe the petition should not be held pending *Skrmetti*. None of these reasons withstands scrutiny either.

Gender Dysphoria. Respondents claim (at 15, 24) that, "[u]nlike *Skrmetti*," Idaho's alleged Medicaid policy "does not regulate the treatment of gender dysphoria," but "only regulates transgender individuals." That's directly contrary to Respondent's own complaint, which alleges that Idaho has "a

[1] Idaho now prohibits Medicaid coverage by statute for "any surgical operation or medical intervention" performed to "affirm the individual's perception of the individual's sex in a way that is inconsistent with the individual's biological sex." Idaho Code § 18-8901(2); Pet. 17 n.6 (statute does not affect this petition).

continuing policy of refusing to authorize . . . gender-affirming surgery *for the treatment of gender dysphoria*." App.93a (emphasis added). As alleged, the policy denies coverage for sex-reassignment surgeries to *anyone* seeking to treat gender dysphoria, and it is undisputed that Idaho Medicaid covers similar surgeries to treat other diagnoses for *everyone*, including beneficiaries identifying as transgender. Pet. 15.

"Concession." Respondents repeatedly mention a concession Dr. Hamso made at oral argument, though what Respondents say was conceded shifts over the course of their brief. Opp. 3, 15, 20–21, 30, 35. On the Ninth Circuit's telling, Dr. Hamso conceded that "the [alleged] policy exclusively burdens transgender beneficiaries." App.5a; Pet. 11 n.5 (explaining why reality is far more complex).[2]

Even so, the concession is irrelevant to the Equal Protection analysis, which is why Petitioner assumed an exclusive burden on "transgender individuals" for this petition too. Pet 11 n.5. The fact that a regulation of a medical treatment exclusively affects members of a quasi-suspect class[3] does not subject it to heightened scrutiny—the Court has applied rational basis review to insurance limitations on pregnancy

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[2] Oral Argument at 16:12, https://tinyurl.com/5bnsfcp3 (Q: "Would you agree with me that a cisgender individual is never going to seek a surgery like this for gender dysphoria?" A: "That seems likely, Your Honor.").

[3] As explained, Pet. 8 n.4, Petitioner does not concede that transgender status is a quasi-suspect class, but merely assumes so for purposes of the petition because the question was foreclosed and not briefed below.

and restrictions on abortion access even though "only women can become pregnant" and an abortion is "a medical procedure that only one sex can undergo." *Geduldig*, 417 U.S. at 496 n.20 (first quote); *Dobbs*, 597 U.S. at 236 (second quote). As in other disparate-impact cases, heightened scrutiny applies only if a regulation is a "mere pretext[] designed to effect an invidious discrimination." *Geduldig*, 417 U.S. at 496 n.20.

These same arguments were raised in *Skrmetti*.[4] So the concession/assumption here does nothing to remove the case from the reach of a *Skrmetti* decision.

Interlocutory Posture. Respondents also suggest (at 2, 21, 35) that this appeal's interlocutory posture makes the Court's intervention improper or unnecessary. But this Court regularly reviews interlocutory appeals from the denial of qualified immunity, *Behrens v. Pelletier*, 516 U.S. 299, 305–11 (1996), and whether a "violation of a constitutional right" has been alleged is the first prong of qualified immunity. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Moreover, disposing of the petition after holding it pending *Skrmetti* (1) requires no further factual development because the question is purely legal, and (2) is far more efficient than having Petitioner continue litigating in district court under an erroneous holding.

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[4] Brief for Respondents at 42, *Skrmetti*, No. 23-477 (Oct. 8, 2024) ("Any disparate impact on transgender-identifying persons does not create a classification under the Equal Protection Clause."); Transcript of Oral Argument at 25:22–26:25, *Skrmetti*, No. 23-477 (Dec. 4, 2024), https://tinyurl.com/bdd5jj4j (asking about *Geduldig* and *Dobbs*).

* * *

Respondents' futile attempts to distinguish the facial discrimination question in *Skrmetti* confirm what even the Ninth Circuit acknowledged—*Skrmetti* "raise[s] similar Equal Protection issues" to this case. App.4a n.2. As it turns out, the issues are *extremely* similar. Since it is likely that the analysis there will bear on whether the Ninth Circuit was correct here, the Court should hold the petition so Petitioner can receive the benefit of a GVR should the Court agree with her position on the issue.

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

Because *Skrmetti* involves a materially identical issue, the Court's grant of certiorari there shatters any argument that the law governing Respondents' claim was "clearly established." Pet. 19–20. But even setting *Skrmetti* aside, Respondents still do not dispute (because they can't) any of the following premises from Petitioner's opening brief:

- This Court has never held that the law was "clearly established" based on a "'robust consensus' of district court decisions," App.5a;[5]
- There was no consensus of district court opinions when the actions described in the complaint occurred anyways;[6]

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[5] Pet. 24.

[6] Pet. 24–25 (citing *Lange v. Houston Cnty.*, 499 F. Supp. 3d 1258, 1275–76 (M.D. Ga. 2020)).

- Qualified immunity must be granted when judges disagree on the relevant legal question;[7]
- The Ninth Circuit's "clearly established" holding should have also considered available case law issued after the actions described in the complaint;[8]
- Judicial disagreement has grown since the actions described in the complaint—thirteen circuit judges agree with Petitioner's Equal Protection Clause arguments, and six of them specifically addressed the Medicaid context.[9]

Nothing more is necessary to conclude that the Ninth Circuit should have granted qualified immunity. Both before and after Idaho's alleged Medicaid policy was purportedly applied to Respondents, "reasonable official[s]" reviewing the same body of governing case law as Petitioner have concluded that regulating gender-dysphoria treatments does not violate the Equal Protection Clause notwithstanding any disproportionate impact it has on individuals of a particular sex or identifying as transgender. *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (cleaned up).

Instead of disputing these core premises, Respondents advance a series of non-sequiturs.

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[7] Pet. 21–23 (citing *Reichle v. Howards*, 566 U.S. 658, 669–70 (2012), and *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

[8] Pet. 22–23 (citing *Wilson v. Layne*, 526 U.S. 603, 618 (1999), *Pearson v. Callahan*, 555 U.S. 223, 244 (2009), and *Reichle v. Howards*, 566 U.S. 658, 669–70 (2012)).

[9] Pet. 19–21 & n.8 (collecting cases).

First, Respondents cite (at 31–33) more cases ostensibly on their side of the issue. Most of these cases do not involve the Equal Protection Clause.[10] But the cases are also beside the point—there are *also* cases on the other side of the issue, and "if judges [] disagree on a constitutional question, it is unfair to subject [officers] to money damages." *Reichle v. Howards*, 566 U.S. 658, 670 (2012) (cleaned up).

Second, Respondents try to distinguish (at 28) specific qualified immunity cases from the Petition because they involved Fourth Amendment claims. But it's unclear what Respondents believe would change outside of the Fourth Amendment context. The governing law still must not be applied at a high "level of generality," *Sawyer v. Smith*, 497 U.S. 227, 236 (1990) (Eighth Amendment), and is only clearly established if "every reasonable official would have understood that what he is doing violates" the law, with no judicial disagreement. *Taylor*, 575 U.S. at 825 (cleaned up) (Eighth Amendment); *Reichle*, 566 U.S. at 670 (First Amendment). Indeed, the fact that the Fourth Circuit sitting *en banc* with more than a "split second" (Opp. 28) to consider this issue still divided 8-6 is even *stronger* evidence that the law is unsettled. *Kadel*, 100 F.4th at 164.

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[10] *See Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (Affordable Care Act); *C.P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.*, 536 F. Supp. 3d 791, 796 (W.D. Wash. 2021) (same); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030–31 (D. Alaska 2020) (Title VII); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 576 (S.D.N.Y. 2016) (Medicaid Act); *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) (same); *Doe v. State, Dep't of Pub. Welfare*, 257 N.W.2d 816, 820 (Minn. 1977) (same).

Third, Respondents suggest (at 30–31) that some holding or concession in the Ninth Circuit's opinion establishes that Petitioner subjectively knew her conduct was unlawful. That's false—the Ninth Circuit opinion never mentions Petitioner's knowledge. App.5a. In any event, "the defendant's subjective intent is simply irrelevant" to qualified immunity. *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

Finally, Respondents raise meritless procedural objections. They argue (at 35) that qualified immunity can still be raised later in the case—even though the issue is "purely legal" (Opp. 30) and needs no record development. Moreover, the whole purpose of qualified immunity is to "avoid the burdens of [] pretrial matters" altogether. *Behrens*, 516 U.S. at 308 (cleaned up). Respondents also contend (at 35) that there is no circuit split in the Medicaid-coverage context so "traditional criteria for certiorari" counsel against review—even though Petitioner is not asking for plenary review, and *Skrmetti* is already slated to resolve a conceptually indistinguishable question.

* * *

In the end, the reason Respondent's defenses are not on-point is because Ninth Circuit's decision is indefensible. This Court should summarily reverse.

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 the law was "clearly established" in 2022.

Respectfully submitted,

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