No. ______

In the Supreme Court of the United States

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources, *et al.*,

Petitioners,

v.

SHAUNTAE ANDERSON, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Based on concerns like cost and effectiveness, West Virginia Medicaid excluded coverage for certain surgeries that treat gender dysphoria. It continued to cover other kinds of gender-dysphoria treatments. West Virginia never asked whether a patient was transgender in making any coverage decisions.

A group of Medicaid beneficiaries brought a class-action suit challenging the surgery exclusion. A divided 8-6 en banc Fourth Circuit ultimately decided that West Virginia's surgical exclusion violated the Equal Protection Clause, the Medicaid Act, and the Affordable Care Act's non-discrimination provision. West Virginia Medicaid must now pay for surgical treatments for gender dysphoria.

The questions presented are:

1. Whether West Virginia violated the Equal Protection Clause by declining to cover surgical treatments for gender dysphoria; and

2. Whether West Virginia violated the Medicaid Act and the Affordable Care Act by declining to cover surgical treatments for gender dysphoria.

PARTIES TO THE PROCEEDING

Petitioners who were defendants in the district court and defendant-appellants in the court of appeals are William Crouch, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; Cynthia Beane, in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; and the West Virginia Department of Health and Human Resources.

Under West Virginia law, the agency known as the West Virginia Department of Health and Human Resources was terminated. See W. VA. CODE § 5F-2-1a. The program at issue is still administered by the West Virginia Bureau for Medical Services, which is now in turn overseen by the West Virginia Department of Human Services. Cynthia Persily is the present Cabinet Secretary of the West Virginia Department of Human Services.

Respondents who were plaintiffs in the district court and plaintiff-appellees in the court of appeals are Shauntae Anderson and all others similarly situated.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Fain v. *Crouch*, No. 3:20-cv-00740 (S.D.W. Va.), memorandum opinion and order granting the plaintiffs' motion for summary judgment and denying the defendants' motion for summary judgment issued August 2, 2022; and

Anderson v. *Crouch*, No. 22-1927 (4th Cir.), opinion affirming the district court issued April 29, 2024.

On appeal, this case was argued alongside and decided together with another similar challenge. See *Kadel* v. *Folwell*, 100 F.4th 122 (4th Cir. 2024).

There are no other directly related proceedings within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

West Virginia faces extraordinary challenges when it comes to Medicaid. As one of America's poorest States, and with an aging population, funds for the program are often hard to come by. At the same time, the program's needs are only getting bigger, as Medicaid enrollment has climbed higher—by about 50%—over the last decade. By at least some estimates, West Virginia now has the highest percentage of Medicaid enrollment in the United States. Meanwhile, the State is continuing to grapple with the public-health consequences of an ongoing opioid crisis. And that's not even to mention the long-running negative health profile of West Virginia's population—more adults rate their health negatively in West Virginia than almost anywhere else. Altogether, legislators and state administrators must constantly make hard decisions about how to provide the most services to the most people with the greatest needs in the face of substantial headwinds.

Faced with circumstances like these, the State has implemented measures to control Medicaid costs absent new appropriations. The State "cannot afford to pay the medical bills of all its needy citizens." *W. Va. ex rel. McGraw* v. *U.S. Dep't of Health & Hum. Servs.*, 132 F. Supp. 2d 437, 442 (S.D.W. Va. 2001). This case concerns one avenue for the State to manage costs: limiting coverage for certain medical services. For a great long time, the State has chosen to refuse coverage for certain categories of services even when they are considered medically necessary. At least 20 services are non-covered. By excluding these treatments, the State can direct its dollars to the medical care that provides the best health outcomes for all.

The suit here concerns one specific kind of non-covered service: "[t]ranssexual surgery," which all agree refers to surgery intended to treat gender dysphoria. App.34a. Unlike many states, West Virginia provides many treatments to address gender dysphoria, including psychiatric diagnostic evaluation, psychotherapy, psychological evaluation, counseling, office visits, hormones, and lab work. But "there is no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a treatment for gender dysphoria." *Gibson* v. *Collier*, 920 F.3d 212, 221 (5th Cir. 2019). What's more, the surgeries themselves can cost tens of thousands of dollars, not even including the treatments that precede securing approval for them or the life-long hormone treatments that follow them. So, like many other programs (federal, state, and private alike), West Virginia Medicaid excluded them.

Yet the Fourth Circuit—in a closely divided, 8-6 en banc opinion—declared that the Constitution prevented West Virginia from exercising its judgment in this way. Even though the surgical exclusion does not address sex, does not concern itself with whether the patient is transgender, and does not otherwise speak to a protected class, the majority deemed the exclusion a *facially* discriminatory provision warranting heightened scrutiny under the Equal Protection Clause. Ignoring genuine medical concerns with the procedures at issue, the majority even found that the policy was ordinary sex discrimination of the sort seen in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020). Then, having found its way to heightened scrutiny, the majority rejected the State's legitimate concerns with cost and efficacy, declaring them both unjustified and contrived. The Constitution now dictates gold-standard insurance coverage for

transgender Medicaid beneficiaries in West Virginia, which will come at the expense of other services.

The majority piled on by finding various federal statutes left West Virginia virtually *no* discretion when it comes to any medical care that might touch on a person's transgender status. For instance, the majority thought the surgical exclusion violated the Medicaid Act's "availability" requirement because, among other things, it was "inconsistent" with the mission to "provide medical assistance to people too poor to afford it." App.69a. Likewise, West Virginia was condemned for trying to "get around" the Medicaid Act's comparability requirement by focusing its exclusion on a diagnosis. App.71a. And based on another cursory invocation of *Bostock* (a Title VII case), the court determined that the exclusion violated the Affordable Care Act's anti-discrimination provision, too.

The Court should issue a writ of certiorari to address the chaos that will result from the decision below. The majority's approach further deepens a clear-as-day circuit split on how equal-protection principles apply to this context. It breaks with this Court's own precedents explaining how provisions focused on medical diagnoses don't constitute facial discrimination, even when they're closely tied to a protected population. And it rewrites federal statutes to create a mandate for States to provide free care whenever that care might be connected to transgender status. That mandate doesn't just offend the laws at issue—it also defies common sense.

In his dissent below, Judge Richardson observed how the majority had found "unlawful discrimination where there is none, stripping the states of their prerogative to create health-insurance and Medicaid systems that serve the best interests of their overall populations." App.126a. Likewise, Judge Wilkinson regretfully described the

majority's work as "imperial judging at its least defensible." App.129a. And Judge Quattlebaum explained how the majority had "improperly stack[ed] the deck, effectively ignoring the fair-minded debate about the medical necessity and efficacy of the treatments the plaintiffs seek." App.155a.

These judges are right. The Court should grant the Petition and begin returning the power to the States and their lawmakers.

OPINIONS BELOW

The Fourth Circuit's opinion (App.1a-155a) is reported at 100 F.4th 122. The district court's opinion (App.156a-191a) is reported at 618 F. Supp. 3d 313.

JURISDICTION

The Fourth Circuit entered judgment on April 29, 2024. Petitioners timely filed this petition for certiorari on July 25, 2024. Lower courts had jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment provides that no State may "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

The relevant provisions of the Medicaid Act, related regulations, and the Affordable Care Act's anti-discrimination provision are reproduced at App.192a-194a.

STATEMENT

1. Congress established Medicaid—a federal-state partnership to provide health benefits to low-income residents—about sixty years ago. See 42 U.S.C. § 1396, *et seq*. The States administer and largely enforce the Medicaid program. The federal government in turn provides financial assistance to pay for the benefits if the state program meets certain standards. Overall, the program "was designed as a cooperative program of shared financial responsibility." *Harris* v. *McRae*, 448 U.S. 297, 309 (1980).

To participate in Medicaid, a State must administer a plan that provides medical assistance to "all individuals" who are eligible. 42 U.S.C. § 1396a(a)(10)(A); see *id.* § 1396d(a). The state plan must establish or designate a "single State agency" to administer its Medicaid program. *Id.* § 1396a(a)(5). If a State fails to comply substantially with Medicaid's requirements, the State "risk[s] losing Medicaid funding." *Gallardo By & Through Vassallo* v. *Marstiller*, 596 U.S. 420, 424 (2022). For a state like West Virginia, that loss could be catastrophic. See, *e.g.*, *West Virginia* v. *U.S. Dep't of Health & Hum. Servs.*, 289 F.3d 281, 287 (4th Cir. 2002) ("According to West Virginia, if federal Medicaid funds were withdrawn, West Virginia's health care system would effectively collapse.").

While the Medicaid program requires participating States to provide medical assistance to all plan recipients, 42 U.S.C. § 1396a(a)(19), Congress has also "give[n] the States substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage." *Alexander* v. *Choate*, 469 U.S. 287, 303 (1985). And though Congress has expanded coverage for certain groups as a criterion for continued participation in Medicaid, the statute guarantees States "flexibility in designing plans

that meet their individual needs" and "considerable latitude in formulating the terms of their own medical assistance plans." *Addis* v. *Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998); see also, *e.g.*, *Geston* v. *Anderson*, 729 F.3d 1077, 1079 (8th Cir. 2013) ("[T]he federal Medicaid program not only gives States the option of participating but also gives participating States significant flexibility in defining many facets of their systems.").

The State's flexibility is intended to be real. A State may even rely on "state interests unrelated to the Medicaid program itself when … fashioning the particular contours of its own program." *Pharm. Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 666 (2003) (plurality op.). This flexibility and wide latitude make sense: "[n]o State has unlimited resources, and each must make hard decisions on how much to allocate to treatment of diseases and disabilities." *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581, 612 (1999) (Kennedy, J., concurring in the judgment); accord *Beal* v. *Doe*, 432 U.S. 438, 444-45 (1977) ("[I]t is hardly inconsistent with the objectives of the Act for a State to refuse to fund unnecessary though perhaps desirable medical services."). Ultimately, States must sometimes make tough decisions to deny a requested treatment. The law accounts for that, contemplating that "[t]he [state] agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d).

2. Thousands of low-income, elderly, and disabled West Virginians rely on the State Medicaid Program for their medical care. But serious medical problems are widespread throughout the State. See *Fast Facts*, W. VA. DEP'T OF HEALTH, https://bit.ly/3CXMeYr (last visited July 21, 2024) (noting "West Virginia ranked 2nd highest nationally in the prevalence of general health of adults as

either fair or poor"). So Medicaid is an enormous state budgetary burden—to the tune of billions of dollars—that must be carefully managed.

West Virginia chose the Bureau for Medical Services to administer the State's Medicaid Program. To act as a careful steward, the Bureau has promulgated both a comprehensive State Medicaid Plan and a related Provider Manual. The criteria, limitations, and requirements found in those sources ensure that the Bureau will ultimately serve the "best interests" of all plan "recipients." 42 U.S.C. § 1396a(a)(19).

As the Provider Manual explains, in exercising its discretion to provide the maximum care while appropriately controlling costs, the Bureau excludes twenty-one treatments and procedures from coverage. App.26a. Of relevance here, for at least two decades, the Bureau has exercised its delegated discretion to deny coverage for "[t]ranssexual surgery." Provider Manual § 161 (Jan. 1, 2005 update), https://bit.ly/3NNzl7A. The coverage exclusion encompassed surgical treatment of gender dysphoria, a condition characterized by "discomfort or distress related to an incongruence between an individual's gender identity and the gender assigned at birth." *Bostock*, 590 U.S. at 715.

Medicaid beneficiaries with gender dysphoria in West Virginia are not left without care. Rather, the Bureau continues to cover psychiatric evaluation, psychotherapy, psychological evaluation, counseling, office visits, hormones, and lab work for Medicaid patients diagnosed with gender dysphoria. App.25a-26a. West Virginia's approach is similar to—and in fact more generous than—the approach taken in many other States. See Nathan R. Hamons & Valarie K. Blake, *Transgender Rural Communities and Legal Rights to Gender-Affirming*

Health Care, 124 W. VA. L. REV. 877, 885 (2022) ("One-third of all states do not include hormone therapy as a covered benefit, while about half of states fail to cover gender-affirming surgeries.").

3. Shauntae Anderson is a West Virginia Medicaid beneficiary who was born with male anatomy but identifies as a woman. App.27a. Anderson has been diagnosed with gender dysphoria. App.27a. On Medicaid, doctors have treated Anderson for gender dysphoria through hormone replacement therapy and psychological/psychiatric visits. App.27a. But Anderson now seeks sex-change surgery, specifically breast augmentation and vaginoplasty. App.28a. Doctors have not yet recommended Anderson for a sex-change surgery, and Medicaid has not denied coverage. App.28a.

Anderson sued the Bureau individually and on behalf of a putative class of others similarly situated, arguing that the coverage exclusion discriminated against transgender people in violation of the Fourteenth Amendment, the Medicaid Act, and the Affordable Care Act. App.160a-161a. The district court then certified a class of "all transgender people" enrolled in West Virginia Medicaid who would ever seek "gender-confirming care barred by the Exclusion." App.28a. Ultimately, it granted summary judgment for Anderson and the class, finding that the exclusion inappropriately discriminated against transgender individuals because the "same" surgical procedures were covered when not used to treat gender dysphoria. App.167a-181a. For the same reasons, the court also found that Anderson was right on the statutory claims, too. App.181a-189a. The Court thus enjoined the defendants from enforcing the program's coverage exclusion. App.190a-191a.

4. Petitioners appealed, and briefing and argument was held. But before the panel could rule, the Fourth Circuit sua sponte ordered en banc review. The case was heard alongside a similar challenge to the North Carolina State Health Plan, which excluded coverage for certain medical procedures tied to sex changes. *Fain* v. *Crouch*, No. 22-1927, 2023 WL 2908815, at *1 (4th Cir. Apr. 12, 2023); *Kadel* v. *Folwell*, No. 22-1721, 2023 WL 2908816, at *1 (4th Cir. Apr. 12, 2023).

In a sharply split decision spawning four opinions, the Fourth Circuit affirmed the district court, 8-to-6. App.5a.

Writing for the majority, Judge Gregory found that the State's coverage exclusion was facially discriminatory. App.30a. To get to that result, the majority began from the premise that gender identity is a protected characteristic under the Equal Protection Clause. App.33a. Though the majority conceded that the coverage exclusion did "not explicitly mention transgender *people*," App.34a, the majority found that gender dysphoria is "a diagnosis inextricable from transgender status," App.44a. And while West Virginia's Medicaid Program facially applied to everyone, the majority reasoned that the exclusion only affected transgender individuals because they were the only individuals who would seek treatment for gender dysphoria. App.43a-44a. Thus, the majority concluded that the coverage exclusion discriminated on the basis of gender identity. App.51a. The majority also found that the exclusion discriminated on the basis of sex because a coverage decision could not be made without knowing and considering a patient's "sex assigned at birth." App.51a-54a.

Having found that West Virginia's policy discriminated on the basis of sex and gender identity, the majority applied intermediate scrutiny to the coverage exclusion.

App.57a. The court held that the State's justifications for the exclusion—high costs and conflicting evidence on whether gender reassignment surgery improved health outcomes—were not "exceedingly persuasive" enough to survive intermediate scrutiny. App.57a-59a.

The majority also found that the exclusion violated two statutes. *First*, it found that the exclusion violated the Medicaid Act's availability and comparability requirements. App.69a-72a. It reasoned that West Virginia's program violated the availability requirement because the exclusion categorically denied coverage for a medically necessary procedure and did so arbitrarily. (*How* it was arbitrary was left largely unexplained.) App.69a-70a. The majority further found that the exclusion violated Medicaid's comparability requirement because the State provided necessary services to some categorically needy individuals but denied those "same" services to other categorically needy individuals with a different medical condition. App.71a. *Second*, the majority found that the exclusion violated the Affordable Care Act's anti-discrimination mandate, which prohibits discrimination under the same terms as Title IX. App.72a. The majority applied this Court's decision in *Bostock* to find that West Virginia's coverage exclusion discriminated based on sex. App.73a.

5. Judge Richardson, joined by Judges Wilkinson, Niemeyer, Quattlebaum, Agee, and Rushing, dissented. They saw "nothing about [West Virginia's] polic[y] that discriminates on the basis of sex or transgender status." App.76a. In their view, the majority "misrepresent[ed] how the challenged exclusions actually work[ed] in order to malign them as sex-based and grounded in stereotypes." App.75a. The dissenting judges also observed that the majority "blatantly sidestep[ped]

controlling Supreme Court precedent" and "depart[ed] wholly" from the Equal Protection Clause's "established principles." App.75a. According to the dissenting judges, the majority had warped precedents involving so-called proxy discrimination into a tool for declaring facially neutral statutes discriminatory based on little more than gut instinct.

Judge Richardson also addressed (in a part not joined by two judges) how this Court's reasoning in *Bostock* applies to the equal-protection doctrine. App.98a-108a. Acknowledging that several judges "on other Circuits argue that *Bostock* does not apply outside of Title VII," he believed that "*Bostock*'s principles reverberate in other areas of the law." App.99a. Even so, *Bostock* shows why the exclusion did *not* discriminate on sex or transgender status: no matter an individual's sex or gender identity, an individual "*would still lack a qualifying diagnosis for the treatments.*" App.106a.

Judge Wilkinson echoed the principal dissent and outlined how the majority's decision "bloat[ed] the judicial power" and "negate[d] the ability of the State to select which procedures, operations, and health risks it insures." App.130a. He acknowledged that "the controversies surrounding transgender status will reach the courts," but he also spotted "a big difference between, say, reading a statute and discovering a novel unenumerated constitutional right." App.128a. And he added that debates over transgender treatments are complex, as "[t]he Framers gave us no sure answers to transgender treatments." App.137a. Judge Wilkinson concluded that these difficulties meant that these issues "must be hashed out over time by the people and their chosen representatives"—not by judges. App.137a.

Lastly, Judge Quattlebaum wrote separately to describe how the majority had taken "evidentiary shortcuts" to resolve key questions. App.139a. Once the evidence was handled appropriately, the "lingering questions" about "the medical necessity and efficacy of [the surgical] treatments … support[ed] the states' coverage decisions." App.138a.

REASONS FOR GRANTING THE PETITION

The decision below reflects a deep confusion among the lower courts about how equal protection and related concepts apply to issues implicating transgender persons. First principles should decide this case—a choice to focus on a particular diagnosis is not discriminatory, a State deserves deference on challenging issues of medical judgment, and a case's potential connection to transgender persons shouldn't change the usual discretion that inheres in the Medicaid context. But courts have tied themselves in knots finding otherwise, reaching for heightened levels of scrutiny when none are warranted and declaring neutral provisions discriminatory on their face when their language says otherwise. The Court should grant the Petition to fix that.

I. The Court Should Grant Certiorari To Address The Confusion Over Equal Protection.

The Fourth Circuit held that the Constitution requires States to pay for certain medical procedures in part because the diagnosis prompting them is "inextricable from transgender status" (or gender identity) and sex. App.44a, 51a. But the circuits are split over whether transgender status warrants heightened scrutiny—and, similarly, whether matters implicating the transgender population automatically become matters tied to sex, too.

And the majority ran headlong into several of this Court's precedents when it assumed that distinguishing among medical diagnoses violates the Equal Protection Clause.

A. The circuits are split over whether transgender status implicates heightened scrutiny.

West Virginia's Medicaid policy does not hinge on an individual's status as a transgender person. Indeed, the State does not even ask whether a given Medicaid beneficiary is transgender before deciding what benefits can be given. See also, *e.g.*, C.A.JA.1347-48 (former lead plaintiff noting no "awareness of any denial of a claim … on the basis [the plaintiff was] transgender"). Even so, the majority below concluded that the surgery exclusion "bar[s] treatments on the basis of transgender identity by proxy." App.44a. And because "gender identity" was thought to be "a protected characteristic under the Equal Protection Clause," App.33a, heightened (or intermediate) scrutiny applies, App.51a.

The majority got it wrong in insisting that the exclusion turned on transgender status. (More on that to come.) But even if it had, the circuits are split on whether transgender status or gender identity triggers intermediate (or "heightened") scrutiny at all. The petition presents a clear opportunity to address that question.

On one side of the line fall courts like the Fourth Circuit. There, "transgender persons constitute a quasi-suspect class," so heightened scrutiny applies whenever some separation is thought to implicate them. *Grimm* v. *Gloucester Cnty. Sch. Bd.,* 972 F.3d 586, 613 (4th Cir. 2020). In much the same way, the Ninth Circuit has held that "heightened scrutiny applies to laws that

discriminate on the basis of transgender status, reasoning that gender identity is at least a 'quasi-suspect class.'" *Hecox* v. *Little*, 104 F.4th 1061, 1079 (9th Cir. 2024), petition for cert. pending, No. 24-38 (filed July 11, 2024); see also *Brandt ex rel. Brandt* v. *Rutledge*, 47 F.4th 661, 670 n.4 (8th Cir. 2022) (discerning "no clear error in the district court's factual findings underlying [its] legal conclusion" that a law deserved heightened scrutiny as facially discriminatory against "transgender people").

Conversely, other courts have refused to apply heightened or intermediate scrutiny in similar circumstances. The Sixth Circuit thinks that transgender persons are not a suspect class. See *L.W. by & through Williams* v. *Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023), cert. granted, 2024 WL 3089532 (June 24, 2024); see also *Gore* v. *Lee*, No. 23-5669, 2024 WL 3385247, at *6-9 (6th Cir. July 12, 2024). The Tenth Circuit does, too. See *Druley* v. *Patton*, 601 F. App'x 632, 635 (10th Cir. 2015) ("To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims."). And the en banc Eleventh Circuit did not look to "transgender status" or the like when evaluating a sex-separation bathroom policy like the one at issue in *Grimm*. *Adams by & through Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 809 (11th Cir. 2022). In fact, the most it did was express "grave 'doubt' that transgender persons constitute a quasi-suspect class." *Id.* at 803 n.5.

Things are no better in the district courts, where judges have applied scattered and inconsistent standards to transgender-related equal-protection claims. Generally, there's been a "lack of uniformity" when those courts try to address "whether transgender plaintiffs are members of a protected class whose equal protection

claims are entitled to heightened scrutiny." *Salaam* v. *Stock*, No. 9:19-cv-00689, 2023 WL 3579770, at *5 (N.D.N.Y. May 22, 2023). Compare *Poe* v. *Drummond*, 697 F. Supp. 3d 1238, 1252 (N.D. Okla. 2023) (refusing to find that transgender status is a suspect class), and *Johnston* v. *Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (same), with *Crowder* v. *Diaz*, No. 2:17-CV-1657, 2019 WL 3892300, at *12 (E.D. Cal. Aug. 19, 2019) (holding transgender persons are a suspect class).

Make no mistake: those courts declining to apply heightened scrutiny have the better of the argument. The Fourth Circuit had itself recognized the key grounding principle in years past. "[B]ecause heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that 'respect for the separation of powers' should make courts reluctant to establish new suspect classes." *Thomasson* v. *Perry*, 80 F.3d 915, 928 (4th Cir. 1996). More recently, though, the Fourth Circuit and its sister circuits on the wrong side of the split have seemed anxious to "champion plaintiffs' cause[s]" and afford special status on the most minimal showing. App.75a. In doing so, they've forgotten the standards that should guide them. *Bowen* v. *Gilliard*, 483 U.S. 587, 602-03 (1987) (describing relevant considerations for suspect-class status).

"[T]ransgender individuals do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Gore*, 2024 WL 3385247, at *6. Nor did the plaintiffs here show animus against transgender persons; the word is wholly absent from the opinions below. No evidence suggests that transgender persons are unable to contribute equally to society. And transgender persons can't be called politically powerless

when they've recently achieved some significant victories at all levels of government. *Id.* So the Fourth Circuit was wrong to "begin" its analysis here by "reiterating" its contrary holding in *Grimm*. App.33a; see *B.P.J. by Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542, 577 (4th Cir. 2024) (Agee, J., concurring in part and dissenting in part) (explaining why *Grimm*'s quasi-suspect class analysis was wrong), petition for cert. pending, No. 24-43 (filed July 11, 2024).

But the Court need not answer the question definitively yet. For now, it's enough to recognize that if transgender persons are to receive special protections for things like state-funded benefits, then this Court should be the one to say so. This Court should grant this petition to provide a uniform national answer.

B. The circuits are split over whether policies affecting transgender persons constitute sex discrimination.

The Fourth Circuit also found that West Virginia's choice not to cover certain surgical treatments for gender dysphoria amounts to sex discrimination. Here again, the court plunged into a circuit split on transgender status's relationship to sex discrimination under the Equal Protection Clause—and how this Court's decision in *Bostock* informs that discussion.

The majority below declared West Virginia's law "textbook sex discrimination" based on this Court's reasoning in *Bostock*. App.52a-53a. *Bostock*, of course, held that an employer violates Title VII when he or she fires an employee for being transgender. 590 U.S. at 651-52. *Bostock* determined that "sex … weighs as a factor in the employer's decision" even if the employer never comes to know the person's sex, as "the employer unavoidably

discriminates against persons with one sex identified at birth and another today." *Id.* at 668. And the majority below thought that "[a] third-party administrator cannot make the coverage decision without knowing whether [a particular procedure] is to treat gender dysphoria—in other words, whether the patient was assigned [a different gender] at birth." App.53a.

This kind of thinking—that *Bostock* applies to the Equal Protection Clause and broadly prohibits any distinctions that implicate transgender status—has taken hold in some courts below. Take the Seventh Circuit, which has invoked *Bostock* in holding that "discrimination based on transgender status is a form of sex discrimination" that triggers intermediate scrutiny. *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023), cert. denied, 144 S. Ct. 683 (2024). Others say the same. See, *e.g.*, *Fowler* v. *Stitt*, 104 F.4th 770, 793 (10th Cir. 2024) ("join[ing] the courts that have applied *Bostock*'s reasoning to equal protection claims"); *Hecox*, 104 F.4th at 1079 (citing *Bostock* for the proposition that any "discrimination on the basis of transgender status is a form of sex-based discrimination"). Cf. *Griffith* v. *El Paso Cnty.*, No. 21-CV-00387, 2023 WL 3099625, at *7 (D. Colo. Mar. 27, 2023) (saying that "*Bostock* plainly calls into question whether discrimination against transgender individuals is sex-based discrimination in the equal protection context" but declining to ignore binding circuit-level precedent to the contrary). Courts that espouse this view read *Bostock* to hold that any difference tied to transgenderism necessarily turns on stereotyping about sex. App.53a-54a; see also, *e.g.*, *L.W.*, 83 F.4th at 499 (White, J., dissenting).

Yet once more, other courts disagree. See, *e.g.*, *Naes* v. *City of St. Louis*, No. 22-2021, 2023 WL 3991638, at *2

(8th Cir. June 14, 2023) ("[W]e have not extended *Bostock* to equal protection claims."), vacated on grant of rehearing, 2024 WL 3421389 (July 12, 2024); *Eknes-Tucker* v. *Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023) (explaining that *Bostock* bore "minimal relevance" to an equal-protection claim); *L.W.*, 83 F.4th at 484-85 (finding *Bostock* inapplicable); *Poe*, 697 F. Supp. 3d at 1251 (same). Those courts often focus more on the differences in language between the Equal Protection Clause and Title VII. See, *e.g.*, *Brandt by & through Brandt* v. *Rutledge*, No. 21-2875, 2022 WL 16957734, at *1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., dissental) (expressing "skeptic[ism]" that *Bostock* informs equal-protection analysis in part because "their text is not similar in any way"). Differences like that might explain why, in *Bostock* itself, this Court refused to "prejudge" any question beyond the consequences under Title VII of firing someone for being transgender. 590 U.S. at 681.

And as with the issue of suspect classes, it's the latter group of courts that gets this issue right. "Although *Bostock* was a monumental decision in anti-discrimination law, it doesn't dictate a ruling in favor of every transgender plaintiff who sues over any employment policy," *Lange* v. *Houston Cnty.*, 101 F.4th 793, 804 (11th Cir. 2024) (Brasher, J., dissenting), let alone any insurance policy.

For one, *Bostock* can't just be carbon-copied over to the equal-protection context—the Equal Protection Clause and Title VII are separated by years, they use different language, and they advance different aims. Especially considering how *Bostock* is written as a text-driven enterprise from start to finish, these differences are real and material. *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 308

(2023) (Gorsuch, J., concurring) (rejecting as "implausible on its face" the notion that such "differently worded provisions" as Title VII and the Equal Protection Clause "should mean the same thing"). And *Bostock*'s framework is an especially ill fit for the medical context. While "sex is not relevant to the selection, evaluation, or compensation of employees," *Bostock*, 590 U.S. at 660, it can be relevant in medicine. See, *e.g.*, Frank Griffin, *Law and Policy Approaches to Sex-Based Disparities in Musculoskeletal Health Care*, 16 IND. HEALTH L. REV. 251, 251 (2019) ("Failure to recognize sex-based differences in health and in health care leads to inequalities in delivery and outcome of medical care.").

For another, Judge Richardson's dissent below well explained how the majority twisted the *Bostock* analysis even if one could apply it to this case. It very nearly comes down to just one fact: "changing plaintiffs' sex (or even their transgender status) would not change [West Virginia]'s choice to decline coverage for the requested services." App.106a. Rather, "a patient's diagnosis, and not their sex or transgender status, is the but-for cause of their ability or inability to obtain coverage under both plans." App.106a. As a result, the policy cannot amount to sex discrimination. And that outcome has the happy accident of lining up with common sense. After all, if the State were setting out to discriminate against transgender persons, then it likely would not pay for other gender-dysphoria treatments—and it likely *would* pay for so-called de-transitioning surgeries. But neither is the case. The determination turns on medical facts, nothing else.

The Court should grant the Petition to remind courts that, even post-*Bostock*, sex discrimination can't be assumed merely because a transgender individual might be disadvantaged by a particular policy or law.

C. The Fourth Circuit's treatment of distinctions based on medical diagnosis conflicts with this Court's precedents.

Lower courts have also reached conflicting decisions on the bottom-line question of whether the Equal Protection Clause requires States to pay for gender reassignment surgery under Medicaid. Compare *M.H.* v. *Jeppesen*, 677 F. Supp. 3d 1175, 1193 (D. Idaho 2023) (finding plaintiffs had stated an equal-protection claim based on exclusion of transition surgeries from state Medicaid program), and *Boyden* v. *Conlin*, 341 F. Supp. 3d 979, 1002 (W.D. Wis. 2018) (granting summary judgment for the plaintiffs based on same kind of claim), with *Hennessy-Waller* v. *Snyder*, 529 F. Supp. 3d 1031, 1045 (D. Ariz. 2021) (holding that the plaintiff was unlikely to succeed on his equal-protection claim premised on Medicaid's exclusion of gender reassignment surgery), and *Casillas* v. *Daines*, 580 F. Supp. 2d 235, 246 (S.D.N.Y. 2008) (same). See also Jay M. Zitter, Annotation, *Gender Reassignment or "Sex Change" Surgery as Covered Procedure Under State Medical Assistance Program*, 60 A.L.R. 6th 627 (Supp. 2024) (collecting cases).

But there shouldn't be any confusion on this point. This Court's own precedents answer the question. And the Fourth Circuit ignored those precedents on its way to finding an equal-protection violation from West Virginia's policy. That's yet another reason for this Court to grant certiorari here.

Geduldig v. *Aiello*, 417 U.S. 484 (1974), should have made this case an easy one. There, California excluded pregnancy from the definition of "disability" in its disability insurance program. *Id.* at 486. Several women sued, arguing that the exclusion amounted to sex discrimination because only women can get pregnant. *Id.*

at 490. This Court disagreed, holding that the pregnancy exclusion was not "discrimination based upon gender as such" because it did "not exclude anyone from benefit eligibility because of gender." *Id.* at 496 n.20. Instead, the California program "merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities." *Id.* That wasn't a problem considering "[t]he program divide[d] potential recipients into two groups—pregnant women and nonpregnant persons. While the first group [wa]s exclusively female, the second includes members of both sexes." *Id.* Given that overlap, there was "no risk from which men [were] protected and women [were] not," and vice-versa. *Id.* at 496-97. Ultimately, California's reasons for excluding pregnancy—sustaining the program's self-supporting and cost-effective nature—were legitimate, so no discrimination could be found. *Id.*

Geduldig falls in line with a series of later cases rejecting attempts to establish "proxy" discrimination even though the targeted proxy appeared closely connected with a protected class. In *Personnel Administrator of Massachusetts* v. *Feeney*, for instance, the Court said a hiring preference for veterans was not mere pretext for sex discrimination, even though it substantially favored men. 442 U.S. 256, 274-75 (1979). The same thing happened in *Bray* v. *Alexandria Women's Health Clinic*, in which the Court said opposition to abortion was not automatically sex discrimination. 506 U.S. 263, 270 (1993). In other words, when it comes to a facially neutral rule like West Virginia's exclusion, a plaintiff must be able to show "no rational, nondiscriminatory explanation exists for the law's classification" before heightened scrutiny can apply. App.85a. That's true even when a classification has an intimate connection with a protected class. Cf. *Marietta Mem'l Hosp. Emp. Health Benefit Plan* v. *DaVita Inc.*, 596 U.S. 880, 887 (2022) (holding health plan

did not unlawfully "differentiate in the benefits it provide[d]" to those having end-stage renal disease by limiting coverage for outpatient dialysis, even though dissent argued outpatient dialysis was "an almost perfect proxy" for people with end-stage renal disease).

Like California's exclusion in *Geduldig*, West Virginia's policy does not violate equal protection because members of both sexes, members of various gender identities, and persons carrying both transgender and non-transgender statuses fall inside and outside the exclusion. See, *e.g.*, App.34a; App.166a (noting that only about 20% of transgender persons is in clinical care for gender dysphoria). And the fact "[t]hat a state plan doesn't cover a medical condition that only members of one sex experience does not itself mean that it facially classifies based on sex." App.89a (citing *Geduldig*, 417 U.S. at 496 n.20). "By the same token, the regulation of a course of treatment that only gender nonconforming individuals can undergo would not trigger heightened scrutiny unless the regulation were a pretext for invidious discrimination against such individuals." *Eknes-Tucker*, 80 F.4th 1205, 1229-30 (11th Cir. 2023). No one identified evidence of pretext here. See App.96a.n.16. The statute does not refer to sex explicitly, and it is not an inexplicable "tax on wearing yarmulkes" because obvious justifications for it exist. See *Bray*, 506 U.S. at 270.

From there, it should have been smooth sailing—rational basis would apply, and it would be easily satisfied. The significant costs of these procedures warranted their exclusion, in part because of questions about the surgeries' "medical efficacy and necessity." App.97a & n.17; C.A.J.A.1130-33, 1200-03, 1471-73, 1491-92, 1866, 1885-88; see also Amicus Br. of West Virginia at 17-23, *Fain* v. *Crouch*, No. 22-1927 (4th Cir. Nov. 7, 2022), 2022 WL

16919850 (collecting authorities speaking to cost and efficacy issues); Bryce T. Daniels, *Eighth Amendment Jurisprudence and Transgender Inmates: The "WPATH" to Evolving Standards of Decency*, 2021 MICH. ST. L. REV. 255, 278-79 (2021) (explaining how gender-reassignment surgery "is not a consensus accepted by the medical community as a medically necessary treatment for gender-dysphoric patients"). Excluding coverage allowed West Virginia to shift money elsewhere—to coverage with more certain benefits—while still providing those with gender dysphoria other treatment options. These "legitimate, nondiscriminatory explanations" for the exclusion were enough. App.97a; see also *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) (explaining the rational-basis "inquiry is at an end" when the government can summon "plausible reasons" for its action).

This case is here only because the majority chose to reject *Geduldig* in all but the narrowest of circumstances. It read later cases of this Court to implicitly reject *Geduldig*'s line-drawing exercise. App.38a. That's odd given that the Court has repeatedly—and recently—reaffirmed that *Geduldig* had the right view of things. See *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 236 (2023); *Bray*, 506 U.S. at 271; *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 142 (1977); *Gen. Elec. Co.* v. *Gilbert*, 429 U.S. 125, 136 (1976), superseded by statute, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076, as recognized in *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U.S. 669, 685 (1983). It also thought *Geduldig* applied *only* to pregnancy, limiting the case strictly to its facts while insisting that gender dysphoria went to the "very heart of transgender status." App.39a. But the majority gave no good reason for its cramped reading of *Geduldig*. App.114a & n.28. And were that not enough, the majority declared that West Virginia's

exclusion was "direct" discrimination (not proxy discrimination) all along. It believed that West Virginia was required to "inquir[e] into a patient's sex assigned at birth" to apply its exclusion. App.40a. Not so. The only inquiry West Virginia makes is the diagnosis.

In short, the decision below cannot be reconciled with this Court's precedents. Six judges declared the majority's treatment of *Geduldig* "shocking." App.113a; see also App.132a (Judge Wilkinson noting how the majority had "sidestepp[ed] *Geduldig*"). And the majority rewrote the tests for proxy discrimination "with very little substantive analysis." App.109a. The Court should step in.

II. The Court Should Grant Certiorari To Clarify States' Discretion To Administer Their Medicaid Programs Under Federal Law.

The majority below construed two federal statutes to deny West Virginia room for reasonable decision-making. The Court should grant the Petition to restore it.

A. The Fourth Circuit's treatment of the Medicaid Act conflicts with this Court's cases—and runs into a split again.

The majority concluded that West Virginia's exclusion violated the Medicaid Act's availability and comparability requirements. The former provides that a State cannot "*arbitrarily* deny or reduce the amount, duration, or scope of a required service ... to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c) (emphasis added). The latter says a State must ensure that individuals in any "categorically needy" or "covered medically needy" group receive services "equal in amount, duration, and scope for all beneficiaries within the group." *Id.* § 440.240(b). Yet

the majority never engaged with this Court's authority, which makes plain that neither requirement applies here.

These provisions must be read against the State's discretion. Medicaid and its regulations give States "broad discretion" to set limits on covered procedures and to determine medical necessity. See *Beal*, 432 U.S. at 438; see also *Maher* v. *Roe*, 432 U.S. 464, 480 (1977). "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs." *Alexander*, 469 U.S. at 303. And as even the majority below was forced to concede, "nothing in the statute suggests that participating States are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal*, 432 U.S. at 444. Quite the opposite: the Act says that state plans must "include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives" of the Act. 42 U.S.C. § 1396a(a)(17). And regulations confirm that the State "may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures." 42 C.F.R. § 440.230(d); see also *Casillas*, 580 F. Supp. 2d at 245-46 (explaining how Medicaid plans can accordingly limit required services).

The dissent sussed out what these authorities mean for the Medicaid Act: "the Act's 'availability' and 'comparability' requirements each impose a 'reasonableness' test much like a rational-basis test." App.123a. A State must provide a reason "that could lead a reasonable person to believe that the decision was made in the 'best interests' of the state's Medicaid recipients as a whole." App.123a. And West Virginia could "reasonably conclude that the value these procedures provide in

treating some diagnoses is higher than any value that surgery has in treating gender dysphoria," which "easily" meets this reasonableness test. App.125a.

Contrary to the flexibility that this Court has contemplated, the majority imposed rigid, sweeping constraints on the State. And in doing so, the majority cemented itself on one side of a circuit split over whether all medically necessary services must be covered. Compare *Bontrager* v. *Ind. Fam. Soc. Servs. Admin.*, 697 F.3d 604, 608 (7th Cir. 2012) (medically necessary services must be covered), and *Hern* v. *Beye*, 57 F.3d 906, 911 (10th Cir. 1995) (same), with *Smith* v. *Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (noting that State may place reasonable limits on necessary services, and concluding that Medicaid excluding sex reassignment surgery was reasonable), and *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121, 124 (1st Cir. 1979) (not all medically necessary services must be covered).

On availability, the majority incorrectly held (without any real explanation) that *any* categorical exclusion violates the "objectives" of the Medicaid Act to provide services. App.69a. But that view ignores the point the dissent made—the Act's "objective" is to provide services "to serve a certain *population*," and sometimes categorically excluding a given service with questionable returns will free up funds to provide more services with surer benefits. Cf. *Hodgson* v. *Bd. of Cnty. Comm'rs, Hennepin Cnty.*, 614 F.2d 601, 611 (8th Cir. 1980) (contemplating that a Medicaid agency can restrict services based on their "degree of medical need"). Similarly, the majority declared the exclusion "arbitrary." See App.69a-70a. But it made that pronouncement without addressing the State's reasonable cost and efficacy concerns. Cf. *Marquez* v. *Screen Actors Guild, Inc.*, 525 U.S. 33, 45 (1998) (explaining in another context

that an action is "arbitrary" if it "can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational'").

On comparability, the majority mistakenly supposed that the State was denying coverage to some while granting it to others "with the exact same medical needs." App.71a. But in blinding itself to the underlying diagnosis and focusing on the sought-after procedures' mechanics, the majority lost sight of how surgeries for gender dysphoria address *different* medical needs than facially similar surgeries do. Consider an amputation—an amputation for a gangrenous limb is a much different medical need than an amputation for an individual with body integrity identity disorder. Etiology defines the need. App.93a, 118a. And anyway, it's not even true that these surgeries are mechanically the same, as Petitioners explained below. See, *e.g.*, *Lange*, 101 F.4th at 802 (Brasher, J., dissenting) (describing how "a natal man's 'vaginoplasty'"—of the sort Anderson seeks here—will be very different from a natal woman's). Despite all that, the majority doubles down and describes certain services, such as breast reconstruction post-mastectomy and breast reduction for symptomatic gynecomastia, as "gender-affirming" surgeries, App.43a, despite no medical expert or anything else in the record to support this claim. The majority decided to go it alone.

The Court should grant the Petition to ensure that the Medicaid Act does not straitjacket States in implementing these crucial programs.

B. The Fourth Circuit's decision on Section 1557 rewrites *Bostock* and Title IX.

In one paragraph of analysis, the majority below held that West Virginia had also violated the Affordable Care

Act's anti-discrimination mandate, also known as Section 1557. App.73a. The statute says that, with certain exceptions, no one can "on the ground prohibited under Title VI of the Civil Rights Act . . . [and] Title IX . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, … which is receiving Federal financial assistance." 42 U.S.C. § 18116(a). The majority quoted this language, cited *Bostock*, and declared that the State had engaged in sex discrimination. App.72a-73a.

The principal dissent spotted the problem with that analysis: for the same reason that it didn't discriminate on the basis of sex under the Equal Protection Clause, West Virginia also didn't discriminate on the basis of sex here. App.98a.n.19. And *Bostock* can't be used to bridge that gap. Again, *Bostock* was a narrower decision that expressly refused to "prejudge" other nondiscrimination laws, like Title IX and Section 1557. 590 U.S. at 681. "*Bostock* was clear on [its] narrow reach … and how it was limited only to Title VII itself." *Pelcha* v. *MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021). For good reason. Title VII bars certain actions "because of … sex," full stop. 42 U.S.C. § 2000e-2. Yet Title IX (as incorporated into Section 1557) often permits separation "on the basis of sex." 20 U.S.C. § 1681(a)(1)-(9). Note how it allows for the "maint[enance of] separate living facilities for the different sexes." *Id.* § 1686. Or consider how implementing regulations say that institutions may "operate or sponsor separate teams for members of each sex" in certain circumstances. 34 C.F.R. § 106.41(b). Distinctions are everywhere in Title IX. So Title VII and Title IX can't be treated as one-for-one analogues.

In the end, though, we return to where we started: a State does not discriminate based on sex when it declines

to cover surgeries for a specific medical diagnosis of gender dysphoria. See *L.W.*, 83 F.4th at 480-83; *Eknes-Tucker*, 80 F.4th at 1228; see also *Lange*, 101 F.4th at 803 (Brasher, J., dissenting). Instead, a decision to decline coverage turns on "the risk-reward assessment of treating this medical condition (as opposed to another) with these procedures." *L.W.*, 83 F.4th at 483. And restricting access to gender-transition interventions does not "establish an unequal regime for males and females" because it "applies equally to both sexes." *Eknes-Tucker*, 80 F.4th at 1228. So Section 1557 doesn't apply because there's no discrimination to target.

The Court should grant the Petition to realign Section 1557 with its actual meaning.

III. These Issues are Important, And This Case Is The Right One In Which To Decide Them.

The opinions below made it plain enough: These questions are recurring ones of exceptionally national importance.

Start with the first question presented. It involves a nationally important constitutional question about one of our country's most important cooperative federalism programs—Medicaid. See *Pharm. Rsch.*, 538 U.S. at 650. Remember that, by one count, about half the States have laws like West Virginia's in the Medicaid context (either through express exclusion or silence on coverage). Hamons & Blake, *supra*, at 885; see also *Maggert* v. *Hanks*, 131 F.3d 670, 672 (7th Cir. 1997) ("[M]any state Medicaid statutes contain a blanket exclusion [for these surgeries]."). That means a slew of Medicaid beneficiaries are affected by the decision below. See *Gee* v. *Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 409 (2018) (Thomas, J., dissenting from the denial of certiorari)

("Around 70 million Americans are on Medicaid, and the question presented directly affects their rights."). If the State is right, then all those other States' valid laws are in danger absent this Court's intervention. If the State is wrong, then many individuals are facing obstacles to services to which they're entitled.

As the related *Kadel* case shows, the Fourth Circuit's constitutional analysis isn't just about Medicaid—it's about any state-related insurance program. And if it's true that Title VII cases and equal-protection cases cross-pollinate each other, then the analysis might affect private parties (like employers who provide medical care), too. Really, if the Fourth Circuit's equal-protection analysis is right, then just about any law that involves transgender persons, gender identity, or otherwise might be challenged. So the constitutional question is critical.

The second question presented speaks to how to read "major federal statute[s]." *United States* v. *Donovan*, 429 U.S. 413, 422 (1977). The Medicaid Act implicates billions of dollars each year. It's one of our country's largest spending programs, especially for States. See *Planned Parenthood of Greater Tex. Fam. Plan. & Preventative Health Servs., Inc.* v. *Smith*, 913 F.3d 551, 571 (5th Cir. 2019) (Jones, J., concurring) (noting the Medicaid "program is already one of the most expensive components of state budgets"). If the rules have changed—and States must now cover *every* medical treatment considered (by some medical association or otherwise) to be "necessary"—then that change could send multi-hundred-million-dollar-sized shockwaves throughout the system.

For States like West Virginia, the Fourth Circuit's shift could be catastrophic. It will require painful choices about what other services should be cut. In fact, West

Virginia is already facing monetary demands stemming from the policy the district court forced it to implement here. See generally, *e.g.*, *W. Va. Dep't of Health & Hum. Res., Bureau for Med. Servs.* v. *Forloine*, No. 23-ICA-147, 2024 WL 2381887 (W. Va. Ct. App. May 23, 2024) (Medicaid claims for frontal cranioplasty, brow lift, hairline advancement, and orbital rim recontouring to treat gender dysphoria). So "[t]his is a hard case with high stakes for the State, for Medicaid providers, and especially for Medicaid patients." *Saint Anthony Hosp.* v. *Whitehorn*, 100 F.4th 767, 793 (7th Cir. 2024). Uncertainty can't linger.

The ACA non-discrimination provision's meaning is a recurring, important issue as well. And because Section 1557's application turns on Title IX's terms, its construction has spillover into all sorts of contexts. So again, clarity is needed right away. Unfortunately, confusion over these statutes is likely to worsen, as the current administration has promulgated regulations purporting to shoehorn gender identity into the definitions of sex in both Title IX and the ACA. Those regulations have been enjoined in many places, but they still leave regulated parties lost about which rules apply. See generally *Tennessee* v. *Cardona*, No. 24-072, 2024 WL 3019146, at *1 (E.D. Ky. June 17, 2024) (enjoining new Title IX rule that purports to redefine "sex" to include "gender identity"); *Louisiana* v. *U.S. Dep't of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786, at *2 (W.D. La. June 13, 2024) (same); *Kansas* v. *U.S. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285, at *21 (D. Kan. July 2, 2024) (same); *Tennessee* v. *Becerra*, No. 1:24CV161-LG-BWR, 2024 WL 3283887, at *13 (S.D. Miss. July 3, 2024) (staying Section 1557 regulation barring discrimination based on gender identity). The Court has stepped in before when muddled cases and a new (enjoined) regulation have left

things in a confused state. See, *e.g.*, *Sackett* v. *EPA*, 598 U.S. 651, 679 (2023). "The interpretation of statutes as important as Title IX" and the ACA "should not be subjected so easily to shifts in policy by the executive branch." *Grove City Coll.* v. *Bell*, 465 U.S. 555, 603 (1984) (Brennan, J., concurring in part).

Without this Court's intervention, "a nationally uniform approach" on any of these questions will never be possible. *A.C.*, 75 F.4th at 775 (Easterbrook, J., concurring). And questions presented aside, other fundamental issues—many of which Judge Wilkinson addressed below in dissent—also demand attention.

For instance, how much leeway should States get when making decisions like these—that is, weighing the efficacy and tradeoffs of hotly debated medical procedures? The Court has already said that States should enjoy "wide discretion … in areas where there is medical and scientific uncertainty." *Gonzales* v. *Carhart*, 550 U.S. 124, 163 (2007). In those circumstances, federal courts must be particularly "cautious" and afford States "especially broad options." *Kansas* v. *Hendricks*, 521 U.S. 346, 360 n.3 (1997). That's true "even when the laws at issue concern matters of great social significance and moral substance." *Dobbs,* 597 U.S. at 300. *Geduldig* shows that in action: by deferring to the state decision limiting pregnancy coverage, the "fiscal and actuarial benefits of the program … accrue to members of both sexes." 417 U.S. at 496 n.20. And yet that deference is missing from the decision below.

Relatedly, a "presumption of legislative good faith directs district courts to draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Alexander* v. *S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1235-36 (2024). Yet the decision below reflects no such

presumption; the majority doubted and second-guessed the State's actions at every turn. The Court has counseled more "caution" before a federal court should intervene against "a government body [that] is merely setting conditions on the expenditure of funds it controls." *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity* v. *Mayor & Council of Camden*, 465 U.S. 208, 223 (1984). Once more—there's little caution in what happened below. Granting the petition gives the Court a chance to remind the lower courts of these concepts, too.

This case is an ideal vehicle to address these issues. Judgment is final, and the Court has a well-developed record with which to work. The facts here are typical of any other suit against a state Medicaid agency on these grounds. The questions presented were pressed and passed on below, and they're outcome determinative. Four opinions from an en banc court provide all the analysis necessary. Nothing more will percolate.

This Court's grant of the petition for certiorari in *United States* v. *Skrmetti*, No. 23-477, does not change the need to hear this case, either. *Skrmetti* did not address the statutory questions that the Fourth Circuit resolved against West Virginia. As for the equal-protection analysis, the level of scrutiny, the importance of a state's interest, and the relative "fit" between that interest and the state's solution are different in the Medicaid context. So lower courts and States will still need more help after *Skrmetti*. If this Court sees things otherwise, though, then it should at least hold the case until after it decides *Skrmetti*. Denying the petition outright would only guarantee more chaos. But the better choice is to hear this one, too.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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