No. 24-90

IN THE
Supreme Court of the United States

BILL CROUCH, in His Official Capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources, *et al.*, *Petitioners*,
v.
SHAUNTAE ANDERSON, *et al.*, *Respondents*.

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

Brief *Amici Curiae* of America's Future, Public Advocate of the United States, Eagle Forum, Eagle Forum Foundation, Clare Boothe Luce Center for Cons. Women, Leadership Institute, U.S. Constitutional Rights Legal Def. Fund, Fitzgerald Griffin Foundation, One Nation Under God Foundation, and Conservative Legal Def. and Education Fund in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, Eagle Forum, Eagle Forum Foundation, Clare Boothe Luce Center for Conservative Women, Leadership Institute, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. These *amici* recently filed two *amicus curiae* briefs in this Court urging review of federal court decisions granting special constitutional and legal rights to persons suffering from gender dysphoria and related mental conditions:

- *Little v. Hecox*, U.S. Supreme Court No. 24-38, Brief *Amicus Curiae* of America's Future, *et al.* (Aug. 14, 2024); and
- *West Virginia v. B.P.J.*, U.S. Supreme Court No. 24-43, Brief *Amicus Curiae* of America's Future, *et al.* (Aug. 15, 2024).

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[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

STATEMENT OF THE CASE

The West Virginia State Medicaid Program does not cover certain procedures such as that which was once erroneously termed "sex change surgery" as a supposed treatment for gender dysphoria, in which a person identifies as the opposite sex. *See Fain v. Crouch,* 618 F. Supp. 3d 313, 318 (S.D. W.Va. 2022). Two Medicaid recipients identifying as "transgender" filed suit against the West Virginia Department of Health and Human Resources and other defendants. The district court ruled that the West Virginia Medicaid program discriminated on the basis of transgender status, which it equated to discriminating on the basis of sex.

On appeal, the Fourth Circuit considered the case together with a similar challenge to a state employee health care program out of North Carolina, and upheld the district court. *See Kadel v. Folwell*, 100 F.4th 122 (4th Cir. 2024). The Fourth Circuit found that limiting funding of certain procedures for treatment of gender dysphoria discriminates on the basis of sex, and that the state could not produce an interest sufficient to survive intermediate scrutiny, upholding the district court. *Id.* at 141-142.

SUMMARY OF ARGUMENT

In accord with modern transgender ideology, the circuit court's opinion found no difference between a woman choosing to remove a cancerous breast and a woman wanting to remove a healthy breast. Based on this newly minted world view, the Court found that

West Virginia's Medicaid exclusion for removing a healthy breast to be discriminatory against transgender persons. It made no difference that the court conceded there was no evidence that this longstanding policy was improperly motivated.

The medical authorities on which the circuit court relied were principally sourced to the Standards of Care of the World Professional Association for Transgender Health ("WPATH"). In recent months, an abundance of evidence has surfaced that WPATH is an advocacy group, not a medical organization. It has tailored its recommendations to win cases in court. Other medical professionals are now speaking out against WPATH. Even the American Society of Plastic Surgeons is rescinding its support for and reassessing its position on transgender surgery.

The basis for the circuit court's expansion of the Equal Protection Clause to mandate that the taxpayers of West Virginia pay for transgender care and surgeries stands on even weaker ground. The court improperly relied on its prior decision in the *Grimm* case allowing a girl to use the boys' room for the proposition that anyone claiming transgender status should be eligible for whatever taxpayer-funded healthcare they might want, to make them feel better about themselves.

ARGUMENT

I. THE CIRCUIT COURT OPINION IS BASED ENTIRELY ON FALSE ANALOGIES BETWEEN SERIOUS MEDICAL CONDITIONS GROUNDED IN SCIENCE AND DELUSIONS GROUNDED IN MENTAL ILLNESS.

The Fourth Circuit began its opinion by stating the question it believed was before it:

> Do healthcare plans that cover **medically necessary treatments** for certain diagnoses but bar coverage of those **same** medically necessary treatments for a diagnosis unique to transgender patients violate either the Equal Protection Clause or other provisions of federal law? [*Kadel* at 133 (emphasis added).]

Beginning with the wrong question, it was entirely predictable that the court would reach the wrong result, which it did. The Fourth Circuit crushed distinctions that are readily apparent. To illustrate its assertion that the "same medically necessary treatments" are being withheld from patients with "gender dysphoria," the court explained:

> For example, the Program covers mastectomies to treat **cancer**, but not to treat gender dysphoria; breast-reduction surgery to treat **excess breast tissue** in cisgender men, but not to treat gender dysphoria in transgender men; and chest-reconstruction

> surgery for cisgender women **postmastectomy**, but not for gender dysphoria in transgender women. [*Id*. at 134 (emphasis added).]

The court made **false implications**. West Virginia covers breast-reduction surgery for **all** biological men — not just "cisgender men." West Virginia covers chest-reconstruction surgery for **all** biological women — not just "cisgender women." And, West Virginia covers mastectomies for all biological women — not just "cisgender women."

Then, the court's comparisons about covered care are grounded in **false analogies**. A mastectomy is performed to remove diseased, cancerous tissue.[2] Breast-reduction surgery for excess breast tissue in men is performed because there is an unnatural growth of such tissue which is impairing health.[3] Chest-reconstruction surgery for women is performed after mastectomies which remove cancerous tissue to assist a woman both functionally and with

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[2] "Mastectomy," *Johns Hopkins Medicine* (accessed Aug. 26, 2024).

[3] "Gynecomastia is usually a benign (noncancerous) condition. It may be linked to many different causes of hormone changes.... Some diseases and medical conditions may also cause gynecomastia. These include: Liver diseases; Kidney disease; Lung cancer; Testicular cancer; Tumors of the adrenal glands or pituitary gland...." "Breast Reduction in Men With Gynecomastia," *Johns Hopkins Medicine* (accessed Aug. 26, 2024).

appearance.[4] These procedures can correctly be termed "medically necessary."

The circuit court compared these real, serious, medically necessary treatments with the transitory feelings of persons suffering from "gender dysphoria." Even the Mayo Clinic grounds the diagnosis of "gender dysphoria" in transitory feelings.

> Gender dysphoria is the **feeling** of discomfort or distress that might occur in people whose gender identity differs from their sex assigned at birth or sex-related physical characteristics. Transgender and gender-diverse people might experience gender dysphoria **at some point in their lives**. However, some transgender and gender-diverse people **feel** at ease with their bodies, with or without medical intervention. A diagnosis for gender dysphoria is included in the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).[5]

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[4] "Many women who have a mastectomy — surgery to remove an entire breast to treat or prevent breast cancer — have the option of having the shape of the removed breast rebuilt.... The Women's Health and Cancer Rights Act of 1998 (WHCRA) is a federal law that requires group health plans and health insurance companies that offer mastectomy coverage to also pay for reconstructive surgery after mastectomy." "Breast Reconstruction After Mastectomy," *National Cancer Institute* (Feb. 24, 2017).

[5] "Gender dysphoria," *Mayo Clinic* (accessed Aug. 26, 2024) (emphasis added).

Despite the willingness of the circuit court to find that — for purposes of the equal protection clause — medical and psychiatric conditions are identical, and that removing diseased tissue is identical to removing healthy tissue, this argument cannot be supported.

- Women suffering from cancer who consent to having their breasts removed to save their lives **are not seeking the same care** as women who would want to look more like men;
- Men suffering from excess breast tissue **are not seeking the same care** as women who want their healthy breasts removed to look more like men;
- Women with cancer who have had their breasts removed to save their lives who seek chest-reconstruction surgery to mitigate the damaging effects of mastectomies **are not seeking the same care** as men who want their chests to look more like a woman.

If the differences are not clear, when a woman with breast cancer has a mastectomy, the decision is made to remove **diseased** breast tissue. When a woman chooses to remove **healthy** breast tissue to look more like a man, that is a fundamentally different matter. For the circuit court to draw an identity between them is profoundly wrong.

Additionally, the court based its decision that these procedures desired by persons suffering from gender dysphoria are "medically necessary" primarily on the work of a political advocacy group called WPATH — which is not a neutral medical group as the

court assumed. *See* Section II, *infra.* To be sure, some of the most damning facts about how political WPATH's Standards of Care are have come out since the court's decision, but at this point, there is no excuse for this Court to affirm the decision of a circuit court based on fabrications as to what treatments are "medically necessary."

Just days ago, the American Society of Plastic Surgeons announced that it is reviewing the issue of transgender surgery because there is: "'considerable uncertainty as to the long-term efficacy for the use of chest and genital surgical interventions' and that 'the existing evidence base is viewed as low quality/low certainty.'" Kendall Tietz, "American Society of Plastic Surgeons breaks consensus of medical establishment on transgender care," *Fox News* (Aug. 15, 2024); *see also* "American Society of Plastic Surgeons Acknowledges 'Low Quality' Evidence Backing Gender Surgeries for Minors," *Do No Harm* (Aug. 14, 2024); "A Consensus No Longer," *City Journal* (Aug 12, 2024).

The court singled out the mental illness of "**gender dysphoria**" for favored treatment by West Virginia. However, how would it address a closely similar mental illness of "**bodily integrity dysphoria**" by which a person seeks to remove a healthy arm or leg due to feelings that the person feels discomfort being able-bodied?[6] A dozen years ago, *The Guardian* ran a lengthy story on "The science and

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[6] *See generally* American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders, Fifth ed. (DSM-5).

ethics of voluntary amputation: Should amputation be offered as a treatment to people suffering from Body Integrity Identity Disorder?," *The Guardian* (May 30, 2012). That article reported on amputations of healthy legs by Robert Smith, a surgeon at the Falkirk and District Royal Infirmary in January 2000. Should this be permitted? And, even if permitted, should a state such as West Virginia be compelled to pay for the surgery? If not, why not? The primary difference between "gender dysphoria" and "bodily integrity dysphoria" appears to be the degree to which political activists have embraced it as a victim class, and thus the degree to which this type of mental abnormality has spread into the population.

Lastly, the circuit court adopted the views demanded by the powerful transgender lobby to adopt the gender and pronoun of one's choice. Therefore, the court referred to biological men with gender dysphoria as "women" and "she" and biological women as "he."

If the circuit court is allowed to mandate West Virginia healthcare treat persons according to their gender identity at odds with their biological sex, is it now wrong to limit abortions and hysterectomies[7] to biological women? Should not biological men have an

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[7] *See* "Conforti v. St. Joseph's Healthcare System," *Lambda Legal* (Jan. 5, 2017).

equal claim to those procedures?[8] Is society really benefitted by indulging such self-deception?

II. THE CIRCUIT COURT BASED ITS DECISION ON POLITICS, NOT MEDICAL FACTS.

The Fourth Circuit adopted lock, stock, and barrel the Transgender Ideology of the Left. It stated that "gender dysphoria" is "a condition characterized by clinically significant distress and anxiety...." The court claimed that "[i]f untreated, it can cause debilitating distress, depression, impairment of function, self-mutilation to alter one's genitals or secondary sex characteristics, other self-injurious behaviors, and suicide." *Kadel* at 136. The court cited not to any record evidence for this summary, but rather to the Brief of Medical *Amici.*

The source of most such medical information was said to be the Standards of Care of the World Professional Association for Transgender Health. *Id*. In dissent, Judge Quattlebaum eloquently laid bare the court's error:

> [T]he majority improperly declares statements from the WPATH Standards and the DSM-5 about the treatment of gender dysphoria to be

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[8] "Because you do not have a cervix, you are not at risk for cervical cancer and do not need cervical cancer screening." "As a trans woman or non-binary person assigned male at birth, do I need to get screened for cervical cancer?," *Canadian Cancer Society*.

> facts.... First, the majority improperly determines the statements qualify as indisputable adjudicative facts under Federal Rule of Evidence Rule 201. Second, even if the statements are legislative facts and thus not subject to Rule 201, the majority declares that there is a **consensus** of the medical community on the treatment of gender dysphoria when **the record indicates otherwise**. [*Kadel* at 201-202 (Quattlebaum, J., dissenting) (emphasis added).]

Having accepted the authority of WPATH, the Fourth Circuit repeated the type of mistake this Court made in *Roe v. Wade,* 410 U.S. 113 (1973), which made a legal ruling based on politicized "experts." When *Roe* was overturned in 2022, this Court properly criticized its previous decision for relying on the "expertise" of activists devoted to skewing the debate. "**Relying on two discredited articles** by an **abortion advocate**, the Court erroneously suggested — contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority — that the common law had probably never really treated post-quickening abortion as a crime." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 272 (2022) (emphasis added).

A. WPATH Subordinates Medicine and Science to Politics and Litigation Priorities.

WPATH is not a neutral scientific organization. It is an active combatant in the culture wars. WPATH has been concisely described as "a hybrid professional

and activist organization, where activists have become voting members."[9] As James Esses of the British "Thoughtful Therapists Network" puts it:

> [t]here have long been concerns that the organisation acts more as a partisan lobby group underpinned by gender ideology, instead of a body driven by medical evidence. Many of the senior members of WPATH identify as "trans" or "non-binary" themselves or are gender activists.[10]

WPATH reportedly receives a large percentage of its funding from donations from wealthy progressive billionaires committed to a radical program of ending all distinctions between the sexes. A primary funder of WPATH is the Tawani Foundation. Tawani was founded by the former James Pritzker, who now identifies as Jennifer Pritzker.[11] Pritzker, known as the "first transgender billionaire," is the cousin of Illinois Governor J.B. Pritzker. The entire Pritzker

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[9] L. MacRichards, "Bias, not evidence dominates WPATH transgender standard of care," *Canadian Gender Report* (Oct. 1, 2019).

[10] J. Esses, "What's wrong with WPATH version 8?" *Sex-Matters.org* (Sept. 20, 2022).

[11] D. Larson, "The billionaire Duke trustee behind the remaking of gender," *Carolina Journal* (Sept. 22, 2022).

family is committed to the transgender revolution and are some of its biggest funders.[12]

> Over the past decade, the Pritzkers of Illinois, who helped put Barack Obama in the White House and include among their number former U.S. Secretary of Commerce Penny Pritzker, current Illinois Gov. J.B. Pritzker, and philanthropist Jennifer Pritzker, appear to have used a family philanthropic apparatus to drive an ideology and practice of disembodiment into our medical, legal, cultural, and educational institutions. [*Id.*]

Since 2013, "Pritzker has used the Tawani Foundation to help fund various institutions that support the concept of a spectrum of human sexes." *Id.* WPATH recognized the Tawani Foundation in 2018 for its financial support in producing the then-current SOC-7 version of the WPATH "Standards of Care."[13]

The WPATH committee that produced the current SOC-8 guidelines is dominated by those with obvious conflicts of interest:

> All of them either receive income based on recommendations in the guidelines, work at clinics or universities who receive funds from

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[12] J. Bilek, "The Billionaire Family Pushing Synthetic Sex Identities (SSI)," *TabletMag.com* (June 14, 2022).

[13] "Col. Jennifer Pritzker and TAWANI Foundation Win WPATH Philanthropy Award," *Tawani Foundation* (Nov. 6, 2018).

> advocacy groups, foundations, or pharmaceutical companies who heavily favour a certain treatment paradigm, or have received grants and published papers or research in transgender care. The majority of the members are from the US, and six of them have affiliations with the same university – the University of Minnesota Program in Sexuality, which is primarily funded by ... [Pritzker's] Tawani Foundation....[14]

B. Numerous Scientific Entities Have Finally Begun to Question the Politicization of WPATH.

WPATH's Standards have been criticized by others working with transgender persons. "Beyond WPATH," an organization of "concerned medical and mental health professionals" including numerous doctors, psychiatrists, counselors, and mental health professionals, attacked WPATH's new SOC-8 for a long list of "errors and ethical failures":

> WPATH endorses early medicalization as fundamental while **[European] countries now promote psychosocial support as the first line of treatment** [of gender dysphoria], delaying drugs and surgery until the age of majority is reached in all but the most exceptional cases. A **chapter on ethics** that had appeared in earlier drafts was

[14] L. MacRichards, *supra*.

> **eliminated** in the final release — a further abdication of ethical responsibility.[15]

In fact, "a very short time after [WPATH's SOC-8] went public, a major unexpected 'correction' was issued. However this wasn't a 'correction' this was an ideological turnaround. This change of heart was reported all over the world as it **removed all minimum age requirements** for 'gender affirmative' surgeries," including "14+ years old for cross-sex hormones [and] 15+ years old for double mastectomies."[16] In the final version, WPATH eliminated even these minimum age recommendations, opening the door to a medical and judicial assault on the bodies of young children.

In addition, Beyond WPATH notes, "[w]hile presented as evidence-based, the Standards of Care fail to acknowledge that independent systematic reviews have deemed the evidence for gender-affirming treatments in youth to be of very low quality and subject to confounding and bias, rendering any conclusions uncertain." It adds, "[f]or these and other reasons, we believe **WPATH can no longer be viewed as a trustworthy source** of clinical guidance in this field." *Id.* (emphasis added).

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[15] "WPATH Has Discredited Itself," *BeyondWPATH.org* (emphasis added).

[16] "WPATH Explained," *Genspect.org* (Oct. 1, 2022) (emphasis added).

C. Discovery Elsewhere Has Revealed WPATH's Politicization and Conflicts of Interest.

Ongoing litigation in federal court in Alabama has uncovered evidence that WPATH is far more driven by politics and profits than science. A report provided by Dr. James Cantor, Ph.D., exposes internal WPATH communications admitting that WPATH **changed the recommendations** in SOC-8, under pressure from the Biden Administration, and **at the urging of attorneys hoping to use the SOC in courts** against states like Alabama that seek to protect children from irreversible and damaging surgeries and puberty blocker "treatments."

WPATH presents to the public the appearance of scholarly unanimity, while at least some WPATH stakeholders harbor grave doubts about the safety and efficacy of irreversible surgical and puberty blocker treatments, and whether young children can even give informed consent.

Dr. Cantor states that "[m]embers of the Guideline Development Group acknowledged that there is no consensus among treatment providers regarding the use of puberty blockers."[17] One wrote, "I think *there is no agreement on this within pediatric endocrinologists*, what is **significant risk** especially balanced against the benefits of e.g. **thinking time which can be**

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[17] Appendix A to supplemental expert report of James Cantor, Ph.D., *Boe v. Marshall*, Case No. 2:22-cv-00184, Dkt. 591-24, p. ii (M.D. Ala. 2024).

very important for a 14 year old." *Id.* (bold added). Another member stunningly admitted, "I'm not clear on which 'agreement regarding the value of blockers' is required to be espoused by a WPATH member/mentor. My understanding is that *a global consensus on 'puberty blockers' does not exist.*" *Id.*

Other members "of the WPATH Guideline Development Group repeatedly and explicitly lobbied to **tailor language of the guidelines for the purposes of influencing courts** and legislatures, and to strengthen their own testimony as expert witnesses." *Id.* at vi (emphasis added). Although names were redacted from the communications, one SOC guideline developer stated:

> *I am concerned about language such as '**insufficient evidence**,' 'limited data,' etc… I say this from the perspective of current **legal challenges** in the US.* Groups in the US are trying to claim that gender-affirming interventions are experimental and should only be performed under research protocols (*this is based on two recent federal cases in which I am an expert witness*). In addition, these groups already assert that research in this field is low quality (ie [sic] small series, retrospective, no controls, etc….). My specific concern is that this type of language (insufficient evidence, limited data, etc...) will empower these groups.... [*Id.* (bold added).]

Another member wrote, "I think we need a more detailed defense that we can use that can respond to

academic critics and that *can be used in the many court cases that will be coming up*." *Id.* And yet another wrote, "Here are a number of my thoughts which may be *helpful for Chase and the legal team*." *Id.* (Chase Strangio is Deputy Director for Transgender Justice with the ACLU's LGBT & HIV Project). Another wrote, "*There are* ***important lawsuits happening*** *right now in the US, one or more of which* ***could go to the Supreme Court****, on whether trans care is medically necessary vs experimental or cosmetic. I cannot overstate the importance of SOC 8 getting this right at this important time*." *Id.* at vii (bold added).

Dr. Cantor notes, "Members of the WPATH Guideline Development Group went so far as to explicitly advocate that SOC 8 be written to maximize impact on litigation and policy *even at the expense of scientific accuracy*." *Id.* One wrote, "*My hope with these SoC is that they land in such a way as to have serious effect in the law and policy settings* that have affected us so much recently; *even if the wording isn't quite correct* for people who have the background you and I have." *Id.*

III. THE FOURTH CIRCUIT DIVINED CONSTITUTIONAL LAW WITHOUT ANALYSIS BASED ON THE SUBJECTIVE FEELINGS OF PLAINTIFFS.

A. The Court Had No Basis for Its Belief Equal Protection Is Triggered.

The circuit court acknowledged that "West Virginia's Medicaid Program does not cover every

medically necessary procedure," expressing no problem with exclusions generally. *Kadel* at 139. However, the court ruled that West Virginia could not exclude any services called for by the WPATH Standards of Care, even though the court acknowledged that there was no indication that the decision to exclude such procedures was improperly motivated. The court observed that no one knows "why it was adopted" nor "what information, if any, the Program relied on in adopting the exclusion." *Id*. at 140. Thus, the court had no basis for make a finding of invidious discrimination against West Virginia.

However, the court appears to have been profoundly moved in arriving at enduring principles of constitutional law based on specifics about a plaintiff in this case. The court describes how a biological man seeks "breast augmentation and vaginoplasty" based on how he feels: "[he] struggles with [his] body"; he "worries about [his] safety in public, where strangers have mocked [him] for being transgender"; and he "is concerned that future interactions will escalate to violence." *Id*. at 140. Even if this one plaintiff suffering from the mental condition of "gender dysphoria" actually has all these and more scary "feelings," why would this be a surprise? This is a person who believes that he was born in the wrong body. He looks at his chest and longs to see breasts, and demands others pay for them. He looks at his, shall we say, male reproductive equipment and yearns for the day of his castration, when this equipment is cut off and discarded, and a pale replica of a vagina is cut into his body. If this man has these feelings about his body, would not he be expected to have other

unnatural and unrealistic feelings? In any event, are these allegations about one individual's "feelings," which give every indication that they were crafted by lawyers, now be the basis to discern the original meaning of the Equal Protection Clause?[18]

Based on such considerations, the court drew the following legal conclusion:

> discriminating on the basis of diagnosis is discriminating on the basis of gender identity and sex. The coverage exclusions are therefore subject to intermediate scrutiny. They cannot meet that heightened standard.... Classifications along racial lines, for example, are inherently suspect and subject to strict scrutiny.... Classifications based on sex are also suspect but are subject to intermediate, or "quasi-suspect," scrutiny. [*Id*. at 141-42.]

The court never once looked at the Fourteenth Amendment's Equal Protection Clause — its text, its context, its ratification history, the objective Congress

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[18] This same over-emphasis on the intimate details of the plaintiffs' lives was undertaken in *Grimm*, as described Judge Niemeyer in dissent: "The majority opinion devotes **over 20 pages** to its discussion of Grimm's transgender status, both at a physical and psychological level. Yet, the mere fact that it felt necessary to do so **reveals its effort to effect policy rather than simply apply law**.... [O]ur role as a court is limited. We are commissioned to apply the law and must leave it to Congress to determine policy...." *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586, 636-37 (4th Cir. 2020) (Niemeyer, J., dissenting) (emphasis added).

was seeking to achieve by including it in the Fourteenth Amendment, the understanding of the states that ratified it, its historical context, or the tradition surrounding its application. The court considered nothing resembling what once was considered proper constitutional analysis. If the court had undertaken a meaningful constitutional analysis, it would have been unable, or at least embarrassed, to reach its conclusion that the Fourteenth Amendment Equal Protection Clause should be interpreted and applied to compel government funding of, *inter alia*, the castration of men who have deep-seated mental disturbances.

B. Basing *Kadel* on *Grimm*.

Rather than considering the Constitution, the court relied on another Fourth Circuit decision which has no bearing here (and which these *amici* believe was incorrectly decided): *Grimm v. Gloucester County Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020). The only dispute resolved in *Grimm* was that a high school girl who felt that she was a boy would be allowed to use the boys' room. Here, the *Grimm* school restroom case is being cited to compel the taxpayers of West Virginia to fund the castration of a man who feels like he is or should have been a woman, as well as other types of procedures. This progression demonstrates why test cases are carefully selected by "civil rights" organizations to achieve tiny victories based on innocuous facts, knowing that once a win is achieved, the language of that decision can then be applied — through the legal legerdemain of false analogy — to

control the outcome of entirely different issues, avoiding a re-examination of first principles.

In *Grimm*, the Gloucester County School Board decided that Grimm, a girl, would not be permitted to use the boys' restroom, causing Grimm to file suit in 2015. Some of these *amici* anticipated the risk that this case posed to children and filed four *amicus* briefs supporting the Gloucester County School Board as the case progressed. The district court ruled in favor of the school board. *G.G. v. Gloucester County School Board*, 132 F. Supp. 3d 736 (E.D. Va. 2015). The Fourth Circuit reversed, based in part on guidance letters from the Obama Administration's Department of Education.[19] *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016). After the county filed its petition for certiorari, supported by some of these *amici*,[20] the Trump Administration rescinded the Obama Administration's letters, and the Supreme Court remanded the case back to the Fourth Circuit. *Gloucester County Sch. Bd. v. G.G.*, 580 U.S. 951 (2017). On remand, briefing occurred in the Fourth Circuit, at which time Grimm dismissed her case because she had graduated from school.[21]

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[19] *See G.G. v. Gloucester County School Board*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, Fourth Circuit (May 10, 2016).

[20] *See Gloucester County School Board v. G. G.*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court (Jan. 10, 2017).

[21] *See G.G. v. Gloucester County School Board*, Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, Fourth

To revive her mooted case, Grimm amended her complaint to include an allegation against the county for refusing to modify her school records. The district court then ruled in favor of Grimm, and the Fourth Circuit affirmed. *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020). On June 28, 2021, this Court denied a petition for certiorari.[22] *Gloucester Cty. Sch. Bd. v. Grimm*, 2021 U.S. LEXIS 3441 (2021). Justices Thomas and Alito noted they would have granted the petition.

The parties in *Grimm* realized how significant this case likely would be for the future. The Gloucester County School Board paid a hefty price for attempting to protect its students, paying its own legal fees and paying over $1.3 million in attorney's fees and costs to Grimm's lawyers. Grimm stated: "I hope that this outcome sends a strong message to other school systems, that discrimination is an expensive losing battle." Press Release, "Gloucester County School Board to Pay $1.3 Million to Resolve Gavin Grimm's Case," *ACLU* (Aug. 26, 2021). This Court's denial of certiorari imposed serious costs on those seeking to protect children. After the Court's denial, many school boards modified their policies, putting countless children at risk, as well as violating their innate sense of modesty. The harmful effects of *Grimm* have already continued for much too long. This Court has

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Circuit (May 15, 2017).

[22] *See Gloucester County School Board v. Gavin Grimm,* Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, U.S. Supreme Court (Mar. 26, 2021).

not yet addressed the issue presented here, but it is of vital significance and needs to be addressed.

C. Both Fourth Circuit Decisions Were Based on Flawed WPATH Standards of Care.

The circuit court freely admitted that both *Kadel* and the *Grimm* decision were based on the opinions offered by *amici* "for the proposition that WPATH promulgates 'modern accepted treatment protocols for gender dysphoria.'" *Kadel* at 136, n.6. Thus, if the WPATH Standards of Care are discredited, then the predicate for both *Grimm* and *Kadel* collapses under the weight of erroneous medical assertions. *See* Section II, *supra.* The court admited that it starts "from the premise that gender identity is a protected characteristic," citing *Grimm*. *Kadel* at 143. Again, if *Grimm* is fundamentally wrong, the threshold issue of whether gender identity is a protected characteristic requires re-examination.

The erroneous conclusions of WPATH are just the latest chapter in the story of transgenderism. The modern notion that a boy can be made into a girl follows the path unwillingly and unknowingly blazed by David Reimer, a boy who suffered a botched circumcision. Disgraced psychologist Dr. John Money convinced his parents to transition David by being raised as a girl. Money did not do this on his own, as Johns Hopkins Hospital was deeply involved. A book on this tragic story by John Colapinto, As Nature Made Him: The Boy Who Was Raised As A Girl (Harper Collins: 2000) is as heartbreaking as it is

revealing about dishonesty and corruption within the medical community, a story which should be understood before so-called experts are deferred to by this Court.

D. *Grimm* Too Was Improperly Decided.

Among the issues that need to be reviewed is the *Kadel* court's assertion that the *Grimm* case had previously established that transgender persons constitute a suspect or quasi-suspect class, based on these findings in *Grimm*:

> [i] transgender people have historically been subjected to discrimination,
> [ii] transgender status "bears [no] relation to ability to perform or contribute to society,"
> [iii] transgender people are a discrete group with immutable characteristics; and
> [iv] transgender people are a minority lacking political power. [*Kadel* at 142 citing *Grimm* at 611-13.]

Although it is true that *Grimm* did find transgender persons constitute a quasi-suspect class requiring heightened scrutiny, none of these factors were actually established in *Grimm*. And, *Grimm* was the opinion of a divided panel, over a strong dissent by Judge Niemeyer.

In demonstrating discrimination against transgender persons, the chief evidence was provided by medical associations who claim that transgenders had been "pathologized for many years" — by those

same medical associations. In other words, proof of invidious discrimination is provided by admissions from those who did the invidious discriminating. However, there is good reason to believe that more recent efforts by medical societies to normalize gender dysphoria was a political, not a medical decision.[23]

As to contributing to society, the same medical associations are drawn upon to demonstrate that a person who seeks castration demonstrates "no impairment in judgment, stability, reliability, or general social or vocational capabilities." *Grimm* at 612. At least the court admitted that "gender dysphoria" could cause "some level of impairment." *Id.*

As to "immutable characteristics" the claim accepted by the court was that "transgender is not a choice." *Id.* The *Grimm* court asserted that "gender identity is formulated for most people at a very early age, and, as our medical *amici* explain, being transgender is not a choice." *Grimm* at 612. This statement is at direct odds with many studies that

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[23] Distinguished psychologists Rogers H. Wright, Ph.D., and Nicholas Cummings, Ph.D Sc.D., former president of the APA, have written a powerful book explaining the effect of "political correctness" on "distorting the science and corrupting the profession." R.H. Wright & N. Cummings, Destructive Trends in Mental Health: The Well-Intentioned Path to Harm (Routledge: 2005) at 4, 65-82. Psychologists who opposed "normalizing homosexuality" were demonized and even threatened, rather than scientifically refuted. *Id.* at 9. Even Congress has recognized the extreme politicization of the APA, rendering it the "only professional society in the history of America to be censured by the Congress." *Id.* at xvii.

demonstrate that most grow out of this "immutable characteristic." "[I]n most cases — nearly 70 percent — childhood gender dysphoria resolve." *See* Abigail Shrier, Irreversible Damage: The Transgender Craze Seducing Our Daughters (Regnery: 2020).[24]

As to lacking political power, now society must bow at the altar of transgenderism, such as preferred pronoun use. The trans movement seeks to follow the victimhood strategy set 35 years ago by the homosexual movement.[25] However, *The Hill* reports "more than 50 transgender delegates voted" at the Democratic National Convention, warning Republicans that restricting transgender rights will backfire, as "the political power of transgender Americans is growing."[26] Unless this Court intervenes, federal circuit court judges will have tapped the pockets of West Virginia's population to pay for radical and dangerous procedures because it is being demanded by transgender persons. That is real power.

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[24] *See also* A. Court, "4 out of 5 kids who question gender 'grow out of it': Transgender expert," *New York Post* (Feb. 22, 2023); J. Ristori and T.D. Steensma, "Gender Dysphoria in Childhood," INTERNATIONAL REVIEW OF SOCIAL PSYCHIATRY 28, no. 1 (2016) at 13-20.

[25] *See* A. Mohler, "After the Ball - Why the Homosexual Movement Has Won," *Albert Mohler.com* (undated).

[26] B. Migdon, "Republican offensive risks backfiring with transgender friends, family," *The Hill* (Aug. 27, 2024).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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