Nos. 24-90 and 24-99

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

DALE FOLWELL, State Treasurer of North Carolina, et al.,
Petitioners,

v.

MAXWELL KADEL, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

North Carolina and West Virginia administer state-sponsored health coverage plans that categorically exclude medically necessary gender-affirming care for transgender plan members, while covering that same care for cisgender plan members.

The questions presented are:

(1) Whether the Fourth Circuit correctly concluded that West Virginia's exclusion of care for transgender plan members violates Section 1557 of the Affordable Care Act, which provides that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under[] any health program or activity" that receives federal funds, 42 U.S.C. § 18116(a), because such an exclusion discriminates on the basis of sex;

(2) Whether the Fourth Circuit correctly concluded, in the alternative, that the West Virginia plan violates the Medicaid Act's requirements that states administering Medicaid plans (*i*) make services available to any categorically needy individual in no "less . . . amount, duration, or scope than the medical assistance made available to any other" eligible individual, 42 U.S.C. § 1396a(a)(10)(B); and (*ii*) "provide . . . for making medical assistance available" to eligible individuals, *id.* § 1396a(a)(10)(A); and

(3) Whether the Fourth Circuit correctly concluded, in the alternative, that the plan exclusions violate the Equal Protection Clause by impermissibly discriminating on the basis of sex and transgender status because the plans exclude gender-affirming care for

transgender people while providing the same care to cisgender people without an exceedingly persuasive justification.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES

STATE STATUTES

FEDERAL REGULATIONS

TABLE OF AUTHORITIES (continued)

Page(s)

RULES

OTHER AUTHORITIES

STATUTORY AND CONSTITUTIONAL PROVISIONS

42 U.S.C. § 18116(a) states, in relevant part:

> Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance."

42 U.S.C. § 1396a(a)(10) states, in relevant part:

> A State plan for medical assistance must . . . provide—
>
> (A) for making medical assistance available, . . .
>
> (B) that the medical assistance made available to any individual described in subparagraph (A)—
>
> > (i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

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

INTRODUCTION

North Carolina and West Virginia administer health plans to cover medically necessary healthcare for their state employees and indigent citizens, respectively. Both plans, however, contain a targeted exception: they categorically exclude medically necessary gender-affirming care for transgender recipients. The same treatments are available to cisgender members, including for gender-affirming reasons.[1] These exclusions have serious consequences for the States' transgender plan members: if untreated, gender dysphoria—the condition of marked incongruence between one's gender and one's sex assigned at birth—can have debilitating consequences, including depression, self-injury, and even suicide.

The courts below found three independent reasons to enjoin Petitioners from enforcing the plans' exclusions. *First*, they concluded that the plans impermissibly discriminate on the basis of both sex and transgender status in violation of the Equal Protection Clause of the Fourteenth Amendment by electing to fund the care at issue for cisgender members, but not transgender members. *Second*, the lower courts held that the plans violate Section 1557 of the Affordable Care Act ("ACA"), the statute's anti-discrimination provision. And *third*, with respect to West Virginia's Medicaid plan, they concluded that the exclusions violate the Medicaid Act. Each of these rulings independently supports the injunctions entered below.

Petitioners urge this Court to grant certiorari to determine whether the exclusions violate the Equal Protection Clause, but they fail to properly account for the

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[1] People whose gender identity matches their sex assigned at birth are referred to as cisgender.

fact that the judgments below rest on independent statutory grounds. Those statutory holdings are case-specific, present no circuit splits and are plainly correct. Given those rulings, any decision on the equal protection issues on which Petitioners focus would result in *no* relief to Petitioners. Accordingly, this case provides an exceptionally poor vehicle for the Court to review the equal protection claims raised in the petitions.

By the same token, Petitioners have advanced no persuasive reason why this Court should grant certiorari in conjunction with—or hold this case pending the outcome of—*United States v. Skrmetti*, No. 23-477, which concerns an equal protection challenge to Tennessee's ban on gender-affirming care for transgender minors. The lower courts' statutory rulings, which are not worthy of review, will stand irrespective of this Court's resolution of the equal protection claim, so Petitioners will be enjoined from enforcing the exclusions regardless of any equal protection ruling by this Court in *Skrmetti*.

The petitions for certiorari should be denied.

STATEMENT

A. Factual Background

1. Approximately 1.4 million people in the United States are transgender, meaning that their gender identity—that is, their "deeply felt, inherent sense" of gender—does not align with the sex they were assigned at birth. Pet.App.7. Being transgender is not a matter of choice and is a normal variation of human

development. CA4.JA.4402, 4462.[2] It "implies no impairment in a person's judgment, stability, or general social or vocational capabilities." Br. of Medical Amici 6, No. 22-1721, *Kadel v. Folwell* (4th Cir.), ECF No. 49-1; *see* CA4.JA.4402, 4462.

Transgender individuals often experience gender dysphoria, which is a serious medical condition characterized by "[a] marked incongruence between one's experienced/expressed gender and assigned gender" that "is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning" for "at least six months' duration." CA4.JA.4082 (citing Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451–59 (5th ed. 2013)).

Medical experts have studied treatment for gender dysphoria for well over half a century. CA4.JA.3075, 4555. The broader medical community—including the American Medical Association, the Endocrine Society, the American Psychiatric Association, and the American Psychological Association—all agree that medical treatment for gender dysphoria is standard, safe, effective, and medically necessary. CA4.JA.4084, 4255, 4394, 4417. Meanwhile, the "denial of gender affirming care is harmful to transgender people, as it exacerbates gender dysphoria and leads to negative health outcomes." CA4.JA.4417; *see* CA4.JA.4546–57. "If untreated, gender dysphoria 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."

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[2] Unless otherwise stated, all citations to the Fourth Circuit's Joint Appendix are to the appendix filed in *Folwell v. Kadel*. Likewise, citations to the Petition Appendix refer to the appendix filed in No. 24-99, *Folwell v. Kadel*.

Pet.App.7–8. In line with the medical community's consensus, gender-affirming care is expressly covered in a majority of state Medicaid policies, and for employees of 24 states. *See Medicaid Coverage of Transgender-Related Health Care*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/medicaid (last visited October 28, 2024); *Healthcare Laws and Policies: State Employee Benefits*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited October 28, 2024).

To treat gender dysphoria, the medical community follows the World Professional Association for Transgender Health ("WPATH") Standard of Care. Pet.App.8–9. Those standards represent the evidence-based consensus of the medical and behavioral health community and have been recognized nationally and internationally as the authoritative standards of care by major health and medical organizations, including "the largest healthcare systems in the United States," "most major insurers of healthcare in the United States, including the corporate policy for Blue Cross and Blue Shield," and "many Departments of Corrections, [and] the Federal Bureau of Prisons." CA4.JA.3565, 4158, 4253–54, 4389–90, 4464, 4544. The WPATH Standards of Care recommend "assessment, counseling, and, as appropriate, social transition, hormone therapy, and surgical interventions to bring the body into alignment with one's gender identity." Pet.App.9–10.

2. North Carolina provides healthcare coverage to more than 740,000 state employees, retirees, and dependents through the North Carolina State Health Plan for Teachers and State Employees ("the N.C. Plan"). Pet.App.2. The N.C. Plan is self-funded and

determines what health benefits are excluded from coverage. CA4.JA.3926, 3985; *see* Pet.App.5.

The N.C. Plan covers care only if it meets the Plan's criteria for medical necessity. Pet.App.14. Yet the N.C. Plan excludes from coverage medically necessary "[t]reatment or studies leading to or in connection with sex changes or modifications and related care." Pet.App.2. That exclusion precludes coverage for medically necessary gender-affirming hormones and procedures for transgender people, despite coverage of the same treatments for cisgender people. Pet.App.6; CA4.JA.189–90. For example, the N.C. Plan covers hormone therapy for cisgender men whose bodies do not produce enough testosterone, but not for transgender men. CA4.JA.3791, 3810–11. The N.C. Plan also covers vaginoplasty (the creation or repair of the vagina) for congenital absence of a vagina in cisgender women, but not for transgender women. CA4.JA.3791. The same is true for a variety of other treatments, including puberty-delaying hormone treatment, hysterectomy (removal the uterus), and chest reconstruction surgery. CA4.JA.3791–92, 3810–11.[3]

The cost of providing gender-affirming care is a negligible fraction of the N.C. Plan's budget. While the

[3] More specifically, reimbursements under the Plan are processed based on "procedural codes" and "diagnostic codes." CA4.JA.185. Procedural codes refer to the type of procedure performed, while diagnostic codes refer to the diagnosis that is being treated. *Ibid*. Approximately two dozen procedural codes are eligible for reimbursement under the N.C. Plan *unless* the corresponding diagnostic code is "F64.0 (Transsexualism) or Z87.890 (Personal history of sex reassignment)." CA4.JA.189–90. In other words, the N.C. Plan covers approximately two dozen procedures *unless* the procedure provides gender-affirming care for transgender individuals.

exclusion has been in effect since 1990, for one calendar year—2017—the Plan temporarily eliminated the exclusion in response to federal regulatory guidance.[4] For that one-year period, the actual cost of gender-affirming care to the Plan? $404,609.26. CA4.JA.3799, 3812–13. By comparison, between January and August 2018, the Plan collected approximately $2,400,000,000 in revenue, processed more than $2,000,000,000 in claims, and had a positive cash balance of approximately $1,100,000,000. CA4.JA.3907–18, 3918.

3. West Virginia participates in Medicaid, a federal-state program that provides health insurance to low-income individuals and families. Pet.App.12. West Virginia's Medicaid program (the "W.V. Plan") is administered by the West Virginia Department of Health and Human Resources, Bureau for Medical Services, which decides which treatments are excluded from coverage. Pet.App.14.

Like the N.C. Plan, the W.V. Plan covers only medically necessary procedures. Pet.App.14. Since 2004, the W.V. Plan has categorically denied coverage for "transsexual surgery," which refers to surgery intended to treat gender dysphoria, "regardless of medical necessity." Pet.App.15. There is no indication that the W.V. Plan relied on any medical, scientific, or economic information—or any information or reasoned basis at all—in adopting the exclusion in 2004. *Ibid.* And indeed, the W.V. Plan's own utilization vendor has concluded that this care can be medically necessary. Pet.App.15–16; Crouch.CA4.JA.2143–58.

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[4] In 2016, the U.S. Department of Health and Human Services promulgated a rule prohibiting "categorical coverage exclusion[s] or limitation[s] for all health services related to gender transition." Pet.App.6 n.4.

While excluding medically necessary surgeries for transgender people, the W.V. Plan does, however, cover the same procedures for cisgender people. For example, the program covers vaginoplasty, mastectomy (removal of the breast), breast-reduction surgery, post-mastectomy chest-reconstruction surgery, hysterectomy, oophorectomy (removal of the ovaries), orchiectomy (removal of the testicles), penectomy (removal of the penis), and phalloplasty (creation or reconstruction of the penis) for medically necessary diagnoses other than gender dysphoria. Pet.App.16.

B. Procedural Background

1. The Respondents in No. 24-99 are transgender people or the parents of transgender people in North Carolina who have been denied coverage for gender-affirming care under the N.C. Plan. Pet.App.7, 160.

Connor Thonen-Fleck is the son of Jason Fleck and is enrolled in the N.C. Plan as Mr. Fleck's dependent. Pet.App.163. Before his medical transition, Mr. Thonen-Fleck suffered from serious, increasing distress that jeopardized his health, education, and future. Pet.App.162; CA4.JA.342–44. The daily anguish of being a teenage boy with a typically female chest was unbearable. CA4.JA.344. With his family's support and under the guidance of a team of health care providers, Mr. Thonen-Fleck began treatment for gender dysphoria, including hormone therapy, and ultimately chest reconstruction surgery. Pet.App.162; CA4.JA.342–44, 349–53. But because the N.C. Plan denied Mr. Thonen-Fleck coverage, he was forced to delay surgery and work after school to raise money. Pet.App.163. Mr. Thonen-Fleck and his family paid out-of-pocket for his chest surgery, which Mr. Thonen-Fleck and his father have testified was "life-changing" and "critical for [his] ongoing development and functioning as a young adult." Pet.App.163. Because he

obtained medically necessary gender-affirming care, Mr. Thonen-Fleck's health has improved drastically and he now feels at ease in social settings. He maintains a rigorous academic regimen and works towards his dream of a career as a veterinarian. CA4.JA.349–50. But he requires ongoing hormone therapy, which the exclusion bars. CA4.JA.345.

Julia McKeown is a transgender woman and professor at North Carolina State University. CA4.JA.376–77. She experienced "significant distress" due to gender dysphoria since childhood. CA4.JA.376–77. Dr. McKeown's medical provider referred her for vaginoplasty, but the N.C. Plan denied coverage based on the N.C. Plan's exclusion for gender-affirming care. CA4.JA.378. Unable to forgo treatment any longer, Dr. McKeown raided her savings and retirement account to pay for surgery, which has vastly improved her wellbeing. CA4.JA.378–79. She requires additional gender-affirming care that the exclusion prohibits. CA4.JA.379.

Corbyn Bunting ("Mr. Bunting") is the transgender son of Michael D. Bunting, Jr. JA.391–92. In 2017, after feeling lifelong distress from his body not matching who he is, Mr. Bunting was diagnosed with gender dysphoria and was prescribed puberty-delaying medication. JA.391–92. This treatment helped Mr. Bunting become a happy, outgoing, and personable young man who is "comfortable in his own skin." CA4.JA.411. But the exclusion bars this treatment. CA4.JA.391–92. Mr. Bunting's parents paid out of pocket for puberty delaying medication, but they could only afford a form of injection treatment that carried greater risk of side effects. CA4.JA.392. Mr. Bunting now requires ongoing hormone therapy. *Ibid.*

Finally, Dana Caraway is a transgender woman who worked for the North Carolina Department of

Public Safety and maintains coverage through the N.C. Plan as a retiree. *See* CA4.JA.450–51. She suffered "great distress and mental anguish" due to gender dysphoria. CA4.JA.452. Ms. Caraway's psychologist and therapist recommended gender-affirming surgery, but she could not initially afford it because of the N.C. Plan's exclusion. CA4.JA.454–55. Ms. Caraway eventually withdrew funds from her retirement account to obtain the needed surgery. CA4.JA.455. She still requires additional treatments, including further surgery, but those treatments are not covered by the N.C. Plan and Ms. Caraway is unable to afford them. CA4.JA.456–57.[5]

Respondents filed suit in the Middle District of North Carolina, arguing that the N.C. Plan's exclusion for medically necessary gender-affirming care discriminates on the basis of sex and transgender status in violation of both the Equal Protection Clause and the ACA.[6] CA4.JA.17, 80–91. The parties filed cross-motions for summary judgment. Pet.App.160–61 & n.1. The district court granted summary judgment to Respondents on their equal protection claim. Pet.App.242. The district court permanently enjoined Appellants from enforcing the N.C. Plan's exclusion and ordered that the N.C. Plan cover medically necessary services for the treatment of gender dysphoria. Pet.App.235–37. Petitioners filed an interlocutory appeal of the district court's injunction, which has not been stayed.

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[5] Two additional respondents—Maxwell Kadel and Sam Silvaine—raised equal protection claims that are now moot because they no longer work for the State.

[6] Some Respondents also raised claims under Title VII of the Civil Rights Act of 1964, which have since been resolved and were not on appeal before the Fourth Circuit.

While the appeal was pending, the district court granted Respondents' motion for summary judgment as to the ACA claim as well. *See Kadel v. Folwell*, 2022 WL 17415050 (M.D.N.C. Dec. 5, 2022). The court held that the N.C. Plan violated the ACA's anti-discrimination provision—Section 1557—reasoning that "the exclusion 'necessarily rests on a sex classification' because it cannot be stated or effectuated 'without referencing sex.'" *Id*. at *2 (citation omitted).

2. The Respondent in No. 24-90, Shauntae Anderson, is a transgender Medicaid participant who has suffered from gender dysphoria since childhood. Pet.App.17; Crouch.CA4.JA.294–95. She has been unable to access medically necessary gender-affirming surgery due to the W.V. Plan's exclusion of "transsexual surgery." Pet.App.17. Being denied gender-affirming surgery is agonizing for her, and even basic functions such as dressing, bathing, and using the restroom cause her severe distress on an ongoing, daily basis. Anderson.CA4.JA.295–96.

Ms. Anderson filed suit in the Southern District of West Virginia, individually and on behalf of all others similarly situated, claiming that the W.V. Plan's exclusion of gender-affirming surgery violates the Equal Protection Clause, the ACA, and the Medicaid Act. Crouch.Pet.App.160a–61a. The parties filed cross-motions for summary judgment, and the district court granted Ms. Anderson's summary judgment motion in full. Crouch.Pet.App.190a. The court entered a permanent injunction, which has not been stayed.

3. Respondents in both cases appealed to the Fourth Circuit. The court of appeals ordered the cases to be heard together en banc and affirmed the rulings of both district courts.

a. The Fourth Circuit first concluded that both Plans' exclusions violate the Equal Protection Clause because they discriminate on the basis of sex and transgender status and cannot withstand intermediate scrutiny.

With respect to sex discrimination, the court of appeals reasoned that "[c]ertain gender-affirming surgeries that could be provided to people assigned male at birth and people assigned female at birth are provided to only one group [*i.e.*, cisgender individuals] under the policy." Pet.App.44. For example, "[t]hose assigned female at birth can receive vaginoplasty and breast reconstruction for gender-affirming purposes, but those assigned male at birth cannot." Pet.App.44. Likewise, "those assigned male at birth can receive a mastectomy for gender-affirming purposes, but those assigned female at birth cannot." Pet.App.44; *see also* Pet.App.34 (rejecting West Virginia's factually erroneous argument that the W.V. Plan "do[es] not provide *gender-affirming* treatment to anyone" because "cisgender people *do* receive coverage for certain gender-affirming surgeries"). The Fourth Circuit explained that this is "textbook sex discrimination" because "we can determine whether some patients will be eliminated from candidacy for these surgeries solely from knowing their sex assigned at birth," and "conditioning access to these surgeries based on a patient's sex assigned at birth stems from gender stereotypes about how men or women should present." Pet.App.44–45.

As an alternative holding, the Fourth Circuit concluded that by excluding treatments for gender dysphoria, the Plans impermissibly discriminate on the basis of transgender status, which the court concluded was a quasi-suspect classification. Pet.App.22–23 (citing *Grimm v. Gloucester County School Board*, 972 F.3d 586, 611–13 (4th Cir. 2020), cert. denied, 141

S.Ct. 2878 (2021)). Exclusions of coverage for "sex change" treatments and "transsexual surgery" plainly target gender dysphoria, which is a proxy for transgender status. Pet.App.35. As the court noted, it makes no difference that not all transgender people have gender dysphoria, because "a law is not immune to an equal protection challenge if it discriminates only against some members of a protected class but not others." Pet.App.24 (citation omitted).

The Fourth Circuit rejected Petitioners' reliance on *Geduldig v. Aiello*, 417 U.S. 484 (1974)—a case where this Court held that a state's exclusion of disabilities resulting from "normal" pregnancy did not offend the Equal Protection Clause—because "*Geduldig* is best understood as standing for the simple proposition that pregnancy is an insufficiently close proxy for sex. The same cannot be said for the inextricable categories of gender dysphoria and transgender status." Pet.App.29. The court of appeals also rejected Petitioners' argument that a classification can be a proxy for a protected characteristic only if "no rational, nondiscriminatory explanation exists for the law's classification." Pet.App.42. The court explained that such a rule incorrectly "assume[s] that the presence of a nondiscriminatory reason means the absence of a discriminatory reason," and it "muddle[s] the traditional equal-protection analysis" by "asking the state-interest question twice." Pet.App.42–43.

Finally, the court of appeals concluded that the exclusions do not withstand intermediate scrutiny because they are not substantially related to an important governmental interest. Pet.App.50. The court rejected North Carolina's proposed justification that "the treatments cost too much and were not effective." Pet.App.51. As to cost, "[a] state may not protect the

public fisc by drawing an invidious distinction between classes of its citizens." Pet.App.51 (quoting *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974)). And during the year the N.C. Plan chose to cover this care, the cost was a miniscule fraction of the Plan's budget. CA4.JA.3799, 3812–13. As for effectiveness, the court of appeals determined that on the record before it, North Carolina's "expert testimony . . . does not actually support [its] argument," its "anecdotal evidence that does call into question medical efficacy challenges only some of [Respondents'] evidence," and "those criticisms do not support the notion that gender-dysphoria treatments are ineffective." Pet.App.51. The court also rejected the West Virginia Petitioners' argument "that saving costs and not covering medically ineffective treatments justify the exclusion," reasoning that the record before it did not contain evidence as to "why the exclusion was adopted" or whether there had been "any research or analysis about the cost of providing access to gender-affirming care," Pet.App.52, particularly where the Plan's own medical utilization vendor recognizes this care as medically necessary, Pet.App.15–16; Crouch.CA4.JA.2143–58. Accordingly, the Fourth Circuit concluded that West Virginia's "proffered rationales were created for the purposes of litigation" and "cannot justify the policy under a heightened-scrutiny analysis." Pet.App.52.

b. The court of appeals also affirmed the district court's grant of summary judgment on Ms. Anderson's Medicaid Act claim, which provides an alternative ground for the injunction against enforcement of the W.V. Plan's exclusion. The court of appeals held that the W.V. Plan violates the Medicaid Act's comparability requirement—which requires a state to cover both mandatory and optional services in sufficient

"amount, duration, and scope to reasonably achieve its purpose," while prohibiting the state from "arbitrarily deny[ing] or reduc[ing] 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(b), (c); *see* 42 U.S.C. § 1396a(a)(10)(B)—by denying medical benefits to some categorically needy individuals while providing those same benefits to others with identical medical needs simply by defining such services as aimed at treating only certain medical conditions. Pet.App.65–66.

Separately, the court of appeals also reasoned that the W.V. Plan exclusion violates the Medicaid Act's availability requirement—which requires a state to ensure that services available to any categorically needy individual are "equal in amount, duration, and scope for all beneficiaries within the group," 42 C.F.R. § 440.240(b)(1); *see* 42 U.S.C. § 1396a(a)(10)(A)—for two reasons. First, by categorically denying coverage for a specific, medically necessary procedure, the exclusion is inconsistent with the Act's objective to provide medical assistance to people too poor to afford it. Pet.App.63. Second, the exclusion "arbitrarily denies or reduces the amount, duration, or scope of a required service to an otherwise eligible beneficiary solely because of the diagnosis, type of illness, or condition." Pet.App.63–64 (cleaned up).

c. Finally, the Fourth Circuit affirmed the district court's grant of summary judgment on the ACA claim against West Virginia. Pet.App.67. Section 1557 of the ACA provides that no one shall "on the ground prohibited under . . . title IX of the Education Amendments of 1972 . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimina-

tion under, any health program or activity" that receives federal funds. 42 U.S.C. § 18116(a); *see also* 20 U.S.C. § 1681(a) (Title IX) (prohibiting educational programs receiving federal funding from discriminating "on the basis of sex"). Applying this Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Fourth Circuit concluded that the W.V. Plan's exclusion for gender-affirming treatment for transgender patients discriminated on the basis of sex. Pet.App.67–68.

ARGUMENT

The petitions for writs of certiorari should be denied. The Fourth Circuit enjoined enforcement of the N.C. and W.V. Plan exclusions because those exclusions violate the Equal Protection Clause and, in the case of West Virginia, the Medicaid Act and the ACA. The district court has also ruled that the N.C. Plan exclusion violates the ACA. Although Petitioners focus almost entirely on the Fourth Circuit's equal protection holding, the lower courts' statutory holdings are independently sufficient to uphold the injunctions. The injunctions will therefore remain in place regardless of any decision on the equal protection issue. And those statutory holdings do not independently warrant this Court's review because they are correct and do not implicate any circuit splits. Further, Petitioners have not demonstrated any reason why this Court should review the Fourth Circuit's correct equal protection holding in light of its review in *United States v. Skrmetti*, No. 23-477.

I. THE COURTS BELOW INVALIDATED THE EXCLUSIONS ON INDEPENDENT STATUTORY GROUNDS THAT DO NOT WARRANT THIS COURT'S REVIEW.

The petitions primarily challenge the Fourth Circuit's conclusion that the Plans' exclusions violate the Equal Protection Clause. But the underlying injunctions are supported by the lower courts' separate conclusions that the Plans violate the ACA and the Medicaid Act. In particular, the courts below concluded that the N.C. Plan violates the ACA, while the W.V. Plan violates both the ACA and two separate provisions of the Medicaid Act. These statutory holdings provide independent bases supporting the underlying decisions enjoining Petitioners from implementing the Plans' exclusions.

In other words, there is no need for this Court's review of the equal protection issues decided by the Fourth Circuit, because regardless of the equal protection ruling, the Plans' exclusions will continue to violate federal statute. These statutory violations provide independent bases for enjoining the States from enforcing the Plans' exclusions. A grant of certiorari on the equal protection issues alone would thus be inappropriate. *See Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1994) (per curiam) (dismissing writ of certiorari as improvidently granted where "it is not clear that our resolution of the constitutional question will make any difference . . . to these litigants"); *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."). And there is no reason for the Court to grant certiorari to review these statutory questions since they were properly decided and present no splits between the circuit courts.

A. The Fourth Circuit Correctly Found a Violation of Section 1557 of the ACA.

a. Faithfully applying this Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), the Fourth Circuit properly concluded that the W.V. Plan violates the ACA's anti-discrimination provision, Section 1557. Pet.App.68. Section 1557 provides, in relevant part, that no one shall "on the ground prohibited under title VI of the Civil Rights Act of 1964, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or section 794 of Title 29 [*i.e.*, the Rehabilitation Act], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a) (citations omitted). By incorporating these four statutory provisions, Section 1557 states that no health plan receiving federal funds is permitted to discriminate on the basis of race, color, and national origin (under Title VI); sex (under Title IX); age (under the Age Discrimination Act); or disability (under the Rehabilitation Act).

The Fourth Circuit correctly concluded that the W.V. Plan's exclusion of treatments for gender-affirming care for transgender individuals, while including coverage for gender-affirming care for cisgender individuals, violates Section 1557 because it discriminates on the basis of sex. This Court's holding in *Bostock*—that Title VII prohibits discrimination against an employee for being transgender since the statute prohibits its discrimination "because of . . . sex," 42 U.S.C. § 2000e–2(a)(1); *Bostock*, 590 U.S. at 651–52—compels this conclusion. Section 1557 thus prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a) (Title IX), which includes discrimination based on

transgender status. Indeed, *Bostock* itself uses the phrases "because of sex" and "on the basis of sex" interchangeably. *See, e.g.*, 590 U.S. at 664–66, 680; *Burrage v. United States*, 571 U.S. 204, 213 (2014) ("Our insistence on but-for causality has not been restricted to statutes using the term 'because of.' We have . . . observed that '[i]n common talk, the phrase "based on" indicates a but-for causal relationship' . . . ."); *Cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring) (using *Bostock*'s Title VII holding to interpret Title VI).

b. In *Kadel*, the district court has similarly held that—for the same reasons as articulated by the Fourth Circuit in its holding about the W.V. Plan—the N.C. Plan "discriminated against Plaintiffs on the basis of sex" in violation of Section 1557. *Kadel*, 2022 WL 17415050, at *2. The district court has not yet entered judgment on this claim, which is why the Fourth Circuit's decision below does not directly address whether the N.C. Plan also violates the ACA. But given that the en banc Fourth Circuit has already held that the W.V. Plan violates Section 1557, if North Carolina were to appeal the district court's decision, the Fourth Circuit is certain to affirm the district court's conclusion that the N.C. Plan's exclusion violates Section 1557.[7] Thus, even if this Court were to grant certiorari on the equal protection conclusions below, both the N.C. and W.V. Plan exclusions would remain unlawful under Section 1557.

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[7] At an earlier stage of the litigation below, the Fourth Circuit already held Respondents' ACA claims against North Carolina were not barred by sovereign immunity under the Eleventh Amendment. *Kadel v. N. Carolina State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422, 426 (4th Cir. 2021).

B. The Fourth Circuit Correctly Concluded That the W.V. Plan Violates the Medicaid Act.

In addition to concluding that the W.V. Plan violates Section 1557 of the ACA, the Fourth Circuit further held that the W.V. Plan violates the Medicaid Act and its implementing regulations' requirements of comparability and availability. Pet.App.61–66. These holdings provide two *additional*, independent bases justifying the injunction against the W.V. Plan's exclusions, further confirming that a grant of certiorari to address the equal protection issues raised in the petition is unwarranted.

a. The Medicaid Act's comparability requirement requires a state to ensure that services available to any categorically needy individual "shall not be less in amount, duration, or scope than the medical assistance made available to any other" eligible individual. 42 U.S.C. § 1396a(a)(10)(B). The state must provide services that are "equal in amount, duration, and scope for all beneficiaries within the group." 42 C.F.R. § 440.240(b)(1). The same applies to individuals in a covered medically needy group. 42 C.F.R. § 440.240(b)(2). The Fourth Circuit correctly concluded that the W.V. Plan's exclusion of gender-affirming care for transgender people violates the comparability requirement because the Plan provides relevant care for cisgender people while not providing it for transgender people. Pet.App.66.

b. Similarly, the Fourth Circuit properly found that the W.V. Plan violates the Medicaid Act's availability requirement. 42 U.S.C. § 1396a(a)(10)(A) (requiring participating states to "provide . . . for making medical assistance available" to eligible individuals). The Medicaid program requires participating states to

cover both mandatory and optional services in sufficient "amount, duration, and scope to reasonably achieve its purpose," while prohibiting them from "arbitrarily deny[ing] or reduc[ing] 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(b), (c). As this Court has suggested, a Medicaid plan's decision to "exclude[] necessary medical treatment" presents a "serious" statutory challenge to the Medicaid Act's availability requirement. *Beal v. Doe*, 432 U.S. 438, 444 (1977).

The W.V. Plan does exactly what the Medicaid Act prohibits. On the case-specific record before it, the Fourth Circuit concluded that certain gender-affirming care is medically necessary, but that the W.V. Plan "bars coverage of all surgeries to treat gender dysphoria, regardless of medical necessity." Pet.App.64 (emphasis omitted). That exclusion is inconsistent with the Medicaid Act's availability requirement.

C. The Statutory Issues Present No Circuit Splits and Do Not Merit Review by This Court.

This Court should not review the Fourth Circuit's holding that excluding gender-affirming care for transgender people violates both Section 1557 of the ACA and the Medicaid Act. There is no circuit split on either the application of Section 1557 of the ACA or the Medicaid Act.

a. Petitioners make no attempt to suggest that the circuits are split when it comes to the lower courts' ACA holdings, and for good reason: there is no split. The Ninth Circuit—the only other circuit to address similar exclusion under Section 1557 of the ACA—has concluded, like the Fourth Circuit below, that *Bostock*

applies to Section 1557's prohibition against sex discrimination and that accordingly, Section 1557 prohibits discrimination based on transgender status. *Doe v. Snyder*, 28 F.4th 103, 113 (9th Cir. 2022).

b. Likewise, the circuits are not split as to whether state-sponsored health plans that exclude medically necessary gender-affirming care for transgender people from coverage violate the Medicaid Act's comparability or availability requirements. Indeed, besides the Fourth Circuit below, no other circuit has even opined on the issue.

Petitioners' assertion that the Fourth Circuit's decision conflicts with that of the First and Eighth Circuits, *see* Crouch Pet. 26, is meritless. In *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), the First Circuit considered a Massachusetts law limiting the expenditure of state funds for abortions unless the abortion was "necessary to prevent the death of the mother." *Id*. at 122. The First Circuit held that the law *violated* the Medicaid Act's availability requirement because it precluded coverage for "women who will suffer damage to their health, no matter how grievous, [so long as they] will survive without the abortion." *Id*. at 126. The court of appeals held that this "life and death" distinction "crossed the line between permissible discrimination based on degree of need and entered into forbidden discrimination based on medical condition." *Ibid*. If anything, that holding *supports* the Fourth Circuit's conclusion that West Virginia's exclusion violates the Medicaid Act's availability requirement.

Similarly, in *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001), the Eighth Circuit held that a state regulation prohibiting funding for procedures treating "gender identity disorder" was not "unreasonable, ar-

bitrary, or inconsistent with the [Medicaid] Act" because the record included "evidence . . . questioning the efficacy of and the necessity for [gender-affirming surgery]." *Id*. at 761. That fact-based conclusion—which relied on the then-"current state of medical knowledge" 23 years ago, and was based on the specific testimony of experts before the district court, *ibid.*—does not bear on West Virginia's exclusion, which applies to gender-affirming surgeries that the courts below concluded, based on the records in these cases, are medically necessary.

II. THERE IS NO REASON TO CONSIDER THE EQUAL PROTECTION QUESTION HERE IN CONJUNCTION WITH *SKRMETTI*.

In *United States v. Skrmetti*, No. 23-477, this Court granted certiorari to decide whether Tennessee Senate Bill 1, which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause.

Petitioners' arguments for why the Court should *additionally* grant certiorari here are meritless. Petitioners first argue that certiorari should be granted because "*Skrmetti* did not address the statutory questions" resolved below. Crouch Pet. 33. But that reason *disfavors* a grant of certiorari. As discussed above, there is no circuit split concerning the applicability of the Medicaid Act or the ACA to health plans that selectively exclude coverage for medically necessary gender-affirming care. *See* pp. 20–22, *supra*. No other circuit has even opined on the issue. *See* pp. 20–21, *supra*. Petitioners' argument amounts to little more than an assertion that the Fourth Circuit's statutory

decisions are wrong, which does not warrant this Court's review. *See Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 587 U.S. 490, 493 (2019) (per curiam) (noting this Court's "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals").

Next, Petitioners rest their claim for plenary review on irrelevant distinctions between Tennessee Senate Bill 1 and the challenged exclusions. For example, they note that "[l]aws like the one at issue in *Skrmetti* can be promulgated only by state actors exercising traditional police powers over the practice of medicine," but "[c]overage policies can be imposed by private and public sector health plans alike," Folwell Pet. 35; *see also id.* at 15 (distinguishing *Skrmetti* because "[t]his case" arises in the "distinct context of state-funded health benefit plans"). Petitioners have not identified any reason why that distinction matters, nor does one exist: it has no doctrinal relevance to any of the issues presented in these cases.

Finally, Petitioners argue that "there are strong reasons to grant plenary review here too" because "whatever the propriety of banning [gender-affirming] treatments, whether and to what extent the States must *pay* for them is a different and easier question." Folwell Pet. 14. Not so. Sex discrimination is not any more defensible simply because the state inflicts it through a group health plan.

Petitioners alternatively argue that these cases should be held in light of *Skrmetti*. As discussed above, however, the injunctions ordered by the courts below are supported by independent statutory grounds, and thus vacatur of the Fourth Circuit's equal-protection holding would not result in relief to the states. *See* pp. 16–20, *supra*. And because those

statutory claims do not warrant this Court's review, the petitions should be denied altogether.

III. THE FOURTH CIRCUIT CORRECTLY DECIDED THE EQUAL PROTECTION QUESTION.

Putting aside the lower courts' independent statutory holdings invalidating the Plan exclusions under Section 1557 of the ACA and the Medicaid Act, the petitions should be denied because the Fourth Circuit's Equal Protection decision is correct.

A. The Plans Impermissibly Discriminate on the Basis of Sex.

a. The Fourth Circuit correctly concluded that the Plans' exclusions impermissibly discriminate on the basis of sex. This holding is compelled by the Fourth Circuit's conclusion that the Plans cover certain kinds of care for cisgender people, while they exclude the same care for transgender individuals for purposes of gender transition. Pet.App.28, 44. Take, for example, a vaginoplasty (creation or repair of the vagina). "Those assigned female at birth can receive vaginoplasty . . . for congenital absence of a vagina," while "those assigned male at birth," such as Ms. Anderson, "cannot." Pet.App.44. In other words, "when the purpose of the surgery is to align a patient's gender presentation with their sex assigned at birth, the surgery is covered," but when "the purpose is to align a patient's gender presentation with a gender identity that does not match their sex assigned at birth, the surgery is not covered." *Ibid.* "This is textbook sex discrimination," because the coverage decision depends on the sex of the patient. *Ibid*. The statutory discrimination has no independent connection whatsoever to cost or medical necessity.

This is so because the Plans' exclusions "cannot be applied without referencing sex." *Id.* at 45. This Court applied precisely the same reasoning to conclude in *Bostock v. Clayton County*, 590 U.S. 644 (2020), that under Title VII, an employer discriminates on the basis of sex when it takes adverse action against an employee "for being . . . transgender." *Id.* at 651–52. "It is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex," because that discrimination necessarily flows from the lack of alignment between a person's sex assigned at birth and that person's sex today. *Id.* at 660. Similarly, as the Fourth Circuit concluded here, the Plans' decision to exclude gender-affirming care for transgender individuals while allowing it for cisgender individuals means that "we can determine whether some patients will be eliminated" from eligibility for that care "solely from knowing their sex assigned at birth." Pet.App.44.

In a similar vein, the Fourth Circuit was correct to conclude that "conditioning access" to gender-affirming treatment "based on a patient's sex assigned at birth stems from gender stereotypes about how men or women should present." Pet.App.44–45. State actors cannot exclude access to medical treatment "based on fixed notions concerning the roles and abilities of males and females." *United States v. Virginia*, 518 U.S. 515, 541 (1996) (quotation marks omitted). Intermediate scrutiny is triggered here because by excluding coverage for gender-affirming care for transgender patients (while allowing it for cisgender patients), the Plans "rely on overbroad generalizations to make judgments about people that are likely to perpetuate historical patterns of discrimination"—namely, that those assigned male at birth should live in a certain

way and those assigned female at birth should live in another. *Id.* at 542 (cleaned up).

b. After concluding that the Plans discriminate on the basis of sex, the Fourth Circuit easily found that Petitioners failed to put forth an "exceedingly persuasive justification" that would otherwise be required to justify their discriminatory treatment. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citation omitted). Petitioners failed to meet their heavy burden of showing that the Plans' exclusions "serve[] important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Ibid.* (quotation marks omitted).

For one, the Fourth Circuit correctly concluded that as a factual matter, the justifications provided by the W.V. Petitioners had no basis in the historical record and were "created for the purposes of litigation," and were thus insufficient to support the W.V. Plan's discriminatory practices. Pet.App.52; *see Virginia*, 518 U.S. at 533 ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.").

Moreover, both sets of Petitioners point to the costs of covering gender-affirming care, Folwell Pet. 33; Crouch Pet. 22, though this Court has squarely foreclosed relying on cost savings to justify discriminatory policies. *See Mem'l Hosp.*, 415 U.S. at 263 ("[A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens."). Any in any event, the actual cost of eliminating the exclusions is negligible. *See* pp. 5–6, *supra*.

Trying yet another tactic, Petitioners point to certain "efficacy" concerns they have with the subject treatments. Crouch Pet. 22; Folwell Pet. 33. But in

doing so, they seek merely to relitigate the Fourth Circuit's fact-specific conclusion that the Petitioners failed to put forth "evidence to show that gender-dysphoria treatments are ineffective." Pet.App.51. Petitioners do not—and cannot—explicitly challenge that evidence-based ruling here.

B. The Plans Impermissibly Discriminate on the Basis of Transgender Status.

The Fourth Circuit also correctly held that—as an alternative to its holding that the Plans impermissibly discriminated on the basis of sex—the Plans violate the Equal Protection Clause by discriminating on the basis of transgender status. This holding stands independent of the Fourth Circuit's conclusion that the Plans impermissibly discriminate on the basis of sex (which itself stands independent of the lower courts' conclusion that the exclusions violate Section 1557 of the ACA and the Medicaid Act).

This Court's precedents confirm that transgender status is a quasi-suspect characteristic under the Equal Protection Clause. Transgender people have been historically subject to discrimination. *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). They possess a defining characteristic that bears no "relation to ability to perform or contribute to society." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (citation omitted). As a class, they are defined as a discrete group by "obvious, immutable, or distinguishing characteristics." *Bowen*, 483 U.S. at 602 (citation omitted). And they are a "minority" and lack "political[] power[]." *Id.* (citation omitted). By applying these traditional hallmarks, the Fourth Circuit correctly concluded that transgender status is a quasi-suspect class. Pet.App.22–23; *see Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 611 (4th Cir. 2020).

The Fourth Circuit further correctly concluded that the Plans' exclusions discriminate on the basis of transgender status. As discussed in Section III.A *supra*, the Fourth Circuit concluded that the Plans cover certain kinds of gender-affirming care for cisgender people, while excluding the same gender-affirming care for transgender individuals. Pet.App.44. This is enough to establish discrimination on the basis of transgender status, full stop.

The Fourth Circuit was also correct in rejecting Petitioners' argument that the discrimination was based on diagnosis rather than transgender status. Neither exclusion references diagnosis, and the court's conclusion comports with common sense: by banning treatments for "sex changes or modifications" and "transsexual surgery," Pet.App.23–24, the Plans target treatments exclusively when sought by transgender people. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination.").

In arguing otherwise, Petitioners rely heavily on *Geduldig v. Aiello*, 417 U.S. 484 (1974), but as the Fourth Circuit below concluded, that case is inapposite, *see* Pet.App.29–31. In *Geduldig*, the Court rejected an equal protection claim challenging California's disability insurance system's exclusion of coverage for what it labeled as "normal" pregnancies. *Id.* at 492. The *Geduldig* Court, in analyzing the relationship between the equal protection claim (discrimination on the basis of sex) and the challenged exclusion (targeting "normal pregnancies"), found an insuffi-

cient connection between the two to sustain a discrimination-by-proxy argument. *Geduldig* thus held that not every regulation related to pregnancy constitutes a sex-based classification. And indeed, this Court has *only* applied *Geduldig* to reject proxy-based arguments where pregnancy-related issues were presented. *See, e.g.*, *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; *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 (1977); *Bray*, 506 U.S. at 271; *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236–37 (2022). In contrast, as the Fourth Circuit concluded based on the record before it, the "same cannot be said for the inextricable categories of gender dysphoria and transgender status," because "gender dysphoria is simply the medical term relied on to refer to the clinical distress that can result from transgender status." Pet.App.29–30. Targeting one *is* targeting the other.

Moreover, this Court's precedents foreclose Petitioners' impermissibly broad reading of *Geduldig*. Petitioners rely on the fact that the Plans' exclusions do not affect *every* transgender person to argue that the exclusions do not discriminate on the basis of transgender status. But this Court has repeatedly held that a state cannot immunize itself from violating the Equal Protection Clause by discriminating against only a subset of a protected group. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 3–4, 12 (1977); *Mathews v. Lucas*, 427 U.S. 495, 504 n.11 (1976).

C. Petitioners Attempt to Relitigate Factual Questions, Further Confirming That This Case Is a Poor Vehicle for Reviewing the Questions Presented.

Petitioners have not asked this Court to review any of the lower courts' conclusions about the record or their evidentiary rulings, nor would it be appropriate for them to do so. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). And nor do they allege that the Fourth Circuit misapplied the well-settled summary judgment standard in affirming the district courts below. Yet Petitioners seek to use their petitions to challenge several of the factual conclusions upon which the lower courts' decisions rely, in contravention of this Court's settled principle that it will not "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). For example, apparently unsatisfied with the facts in the record of this case, Petitioners cite a dissent from *Lange v. Houston Cnty.*, 101 F.4th 793, 802 (11th Cir. 2024) (Brasher, J., dissenting), for the proposition that the Fourth Circuit "assume[d] a false equivalence between surgical procedures that are patently not the same." Folwell Pet. 24–25; *accord* Crouch Pet. 27; *see also* Folwell Pet. 25 (citing *Poe v. Drummond*, 697 F. Supp. 3d 1238, 1262–63 (N.D. Okla. 2023), for the same proposition as to hormone therapy). Pointing to these sources opining on factual issues outside the record hardly creates a genuine factual dispute in the cases below; and it certainly does not indicate an important legal question for this Court to consider. *See N.L.R.B. v. Hendricks Cnty. Rural*

Elec. Membership Corp., 454 U.S. 170, 176 n.8 (1981) (dismissing a writ of certiorari as improvidently granted where "we are presented primarily with a question of fact, which does not merit Court review").

Disregarding the overwhelming evidence in the record and the fact that this Court is not the appropriate venue to air claims of "erroneous factual findings," *see* Supreme Ct. Rule 10, the Folwell Petitioners further argue that a single comment from one of their experts—claiming that "gender affirmation treatments remain experimental and have never been accepted by the relevant scientific community and have no known or published error rate"—suffices to show that the discriminatory exclusion survives heightened scrutiny. Folwell Pet. 33. But the lower courts reached the opposite conclusion based on a thorough review of the record. *See* Pet.App.241 ("Plaintiffs' doctors, their experts, every major medical association, and Defendants' own third-party administrators all agree that, in certain cases, gender affirming medical and surgical care can be medically necessary to treat gender dysphoria."); Crouch.Pet.App.178a (acknowledging the "consensus in the peer-reviewed literature that gender transition, including medical treatments such as hormone therapy and surgeries, improves the overall well-being of transgender individuals"). And for good reason—there *is* broad scientific consensus about appropriate and generally-accepted treatments for gender dysphoria, and the opinion of Petitioners' expert falls "well outside these well-accepted norms." CA4.JA.4165.

IV. THIS COURT'S REVIEW IS NOT WARRANTED TO RESOLVE ANY CIRCUIT SPLITS ON THE EQUAL PROTECTION ISSUES PRESENTED HERE.

Petitioners argue that certiorari should be granted to resolve circuit splits concerning (1) whether laws that restrict access to or deny insurance coverage for gender-affirming care discriminate on the basis of sex and (2) whether transgender persons are a quasi-suspect class. But as Petitioners concede, "[t]he Court has already granted certiorari in *Skrmetti* to consider these questions in the context of bans on [gender-affirming care] for minors." Folwell Pet. 15. There is no reason to *also* grant certiorari here. *See* pp. 22–24, *supra*.

In any event, Petitioners significantly overstate the scope and extent of the alleged splits. Petitioners' arguments are largely based on dicta and cases that are no longer good law, either because they have been vacated, are being reheard en banc, or are being heard by this Court.

a. The circuits are not split as to whether "laws that restrict access to or deny insurance coverage for [gender-affirming care]" discriminate on the basis of sex. Folwell Pet. 14. In fact, apart from the decision below, none of the cases Petitioners cite even deal with insurance coverage. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), *cert granted*, No. 23-477 (law prohibiting gender-affirming care for minors); *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (law prohibiting "gender transition procedures" for minors) (rehearing en banc granted in the subsequent appeal of a preliminary injunction, *see* No. 23-2681 (Oct. 6, 2023)); *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1210 (11th Cir. 2023) (law

prohibiting "providing puberty blockers or cross-sex hormone treatment" to minors).

Lower courts are still deciding equal protection challenges to laws denying insurance coverage for gender-affirming care. *See, e.g.*, *Dekker v. Secretary, Fla. Agency for Health Care Admin.*, No. 23-12155 (11th Cir.) (considering challenges under the Equal Protection Clause, the Medicaid Act, and the ACA to a law precluding Medicaid reimbursements for gender-affirming care). This Court should wait until a split develops before deciding whether to grant certiorari in an appropriate case. *See Box*, 587 U.S. at 493 (noting that the Court "ordinar[ily] . . . den[ies] petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals").

Further, many of the cases Petitioners rely on are not good law. For instance, Petitioners argue that the Eighth Circuit's decision in *Brandt* exists on one side of the alleged split, *see* Folwell Pet. 15; Crouch Pet. 14, but the Eighth Circuit has granted rehearing in the appeal of a preliminary injunction in that case, and no decision has issued. *See* No. 23-2681, *Brandt v. Griffin* (8th Cir.). It is thus improper to place *Brandt* on any side of an alleged circuit split. Likewise, Petitioners repeatedly cite the Sixth Circuit's decision in *Skrmetti*, but this Court's decision will obviously supplant that of the court of appeals. And, confusingly, the Crouch Petitioners rely upon a vacated opinion and a Northern District of Oklahoma decision that supposedly conflicts with the Tenth Circuit, even though Oklahoma is within the Tenth Circuit. *See* Crouch Pet. 17–18 (citing *Naes v. City of St. Louis*, 2023 WL 3991638 (8th Cir. June 14, 2023), *vacated on grant of rehearing*, 2024 WL 3421389 (July 12, 2024)); *id.* (citing *Poe v. Drummond*, 697 F. Supp. 3d 1238 (N.D. Okla. 2023),

and arguing that it forms a split with *Fowler v. Stitt*, 104 F.4th 770, 793 (10th Cir. 2024)).

b. The circuits are not split as to whether transgender persons are a quasi-suspect class.

The Fourth and Ninth Circuits have held that transgender persons are a quasi-suspect class. *See Grimm*, 972 F.3d 586; *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2024) (cert pending). The remaining circuits have not decided the issue. In *Fowler v. Stitt*, 104 F.4th 770 (10th Cir. 2024), the Tenth Circuit "decline[d] to decide whether transgender status is a quasi-suspect class." *Id*. at 794; *see Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015). Likewise, in *Skrmetti*, the Sixth Circuit expressed skepticism that transgender persons are a quasi-suspect class but stopped short of deciding the issue. *See Skrmetti*, 83 F.4th at 486. And in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), the Eleventh Circuit expressed in dicta "doubt that transgender persons constitute a quasi-suspect class," though this comment was not part of that court's holding. *Id*. at 1230. Accordingly, there is no split that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petitions should be denied.

Respectfully submitted,

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