No. 24-90

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

It's hard to argue that a sharply divided en banc decision on an issue of national importance doesn't warrant this Court's attention. But in trying to do just that, Respondents stretch the facts and law in ways that can't be justified. Those efforts confirm that the Court's immediate review is warranted.

On the facts, Respondents lose the thread on the first page of their response. West Virginia Medicaid does not "categorically exclude" coverage for gender dysphoria. Contra Opp.1. Just the opposite: it covers various medical treatments (including counseling, hormone therapy, and more) while excluding one specific group of costly and contested surgeries. West Virginia Medicaid also doesn't target "transgender recipients." *Id.* West Virginia Medicaid doesn't even *know* whether an individual is transgender, let alone make decisions based on that status. And West Virginia Medicaid has not excluded surgeries that are conceded to be "medically necessary." *Id.* As Petitioners explained before, Pet.2, "there is no consensus in the medical community about the necessity and efficacy of sex reassignment surgery as a treatment for gender dysphoria." *Gibson* v. *Collier*, 920 F.3d 212, 221 (5th Cir. 2019); see also, *e.g.*, *Smith* v. *Rasmussen*, 249 F.3d 755, 761 (8th Cir. 2001) (upholding constitutionality of Iowa's Medicaid exclusion for "sex reassignment surgery" given "the disagreement regarding the efficacy of sex reassignment surgery").

Things get worse on the law. Respondents concede that the courts below are deeply divided over the principles that drive these cases. Some apply heightened scrutiny, others don't. Some apply rigid requirements for Medicaid coverage that leave next to no room for state discretion, others don't. These disputes over foundational

principles have left the lower courts confused. And in the end, those courts that find a constitutional problem with what States like West Virginia have done are compelled to run away from right-on-point Supreme Court precedent on similar insurance exclusions.

Respondents' arguments confirm that this Court should decide this important question. This case goes far beyond West Virginia's borders. Many State Medicaid programs have exclusions like West Virginia's. And the Fourth Circuit's analysis will rewrite the law even beyond the surgical-exclusion realm; States will lose discretion in how they design their Medicaid programs, State laws and policies affecting non-protected traits that happen to align with transgenderism will be called into doubt, and constitutional law will be enlisted to resolve hotly debated social issues better decided by the voters.

Six judges below saw the problems this decision foretells. Leaving the decision in place will "embolden the lower courts to reject state laws on questionable constitutional grounds." *County of Maricopa* v. *Lopez-Valenzuela*, 135 S. Ct. 2046, 2047 (2015) (Thomas, J., dissenting). But the majority's decision "should not be the first, last, and only word on this volatile set of issues." App.129a (Wilkinson, J., dissenting). The Court should grant the petition and address them now.

ARGUMENT

I. The Court Should Grant Certiorari To Confirm The Equal Protection Clause Does Not Preclude States From Reasonably Excluding Certain Coverage.

A. The circuits are squarely divided.

At least two circuit splits concerning equal protection are deeply entrenched and need to be resolved. Contra Opp.32.

First, courts are split over whether transgender status implicates heightened scrutiny. Pet.13-16. Respondents barely engage with this issue, dismissing what the circuits have said because they haven't purportedly "decided the issue." Opp.34. But everyone knows where the courts stand.

Many courts reject the idea of "transgender persons" as a quasi-suspect class. Certainly, the Eleventh Circuit has. See *Adams ex rel. Kasper* v. *Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022) (en banc); *Eknes-Tucker* v. *Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023) (same); *Eknes-Tucker* v. *Governor of Alabama*, 114 F.4th 1241 (11th Cir. 2024) (en banc) (Lagoa, J., concurral) (same). Though Respondents chalk all that up to dicta, that court recently made plain it was not. See *Corbitt* v. *Sec'y of the Ala. L. Enf't Agency*, 115 F.4th 1335, 1347 n.9 (11th Cir. 2024). And the Sixth Circuit then invoked the Eleventh Circuit when it too found that transgender persons are not a suspect class. *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 486 (6th Cir. 2023).

On the other side of the split, the Fourth and Ninth Circuits have applied heightened scrutiny to laws that

they think discriminate based on "transgender status." See *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020); *Hecox* v. *Little*, 104 F.4th 1061, 1079 (9th Cir. 2024). Indeed, since the Petition was filed, the Ninth Circuit held that an Idaho Medicaid administrator "violated the transgender Plaintiffs' clearly established right to be treated equally to other, non-transgender Medicaid beneficiaries when seeking Medicaid coverage for the same medically necessary surgeries" after subjecting subjected the exclusion to "heightened scrutiny." *M.H.* v. *Hamso*, No. 23-35485, 2024 WL 4100235, at *2 (9th Cir. Sept. 6, 2024). So Respondents can't ignore this entrenched circuit split.

Second, courts are split over whether policies affecting transgender persons amount to sex discrimination. See Pet.16-19. Respondents try to narrow the split to the specific context of insurance coverage. Opp.32-33. But they never say why the Court should view this issue so narrowly, especially when Respondents simultaneously argue that *Skrmetti* (a non-insurance case) can resolve the equal-protection question. Opp.23. Respondents' related argument that the Court should wait to resolve this issue can be dispatched for the same reasons. Opp.33. The Fourth Circuit's ruling harms States and their residents every day it stands—waiting wouldn't provide any additional benefits.

This split is live, too. Respondents discount it, arguing that "many of the cases … are not good law." Opp.33. Wrong. Though the Eighth Circuit granted initial en banc review in the defendants' appeal of a *permanent* injunction in *Brandt* v. *Griffin*, the court never vacated its earlier decision on the *preliminary* injunction. See No. 23-2681 (8th Cir. 2023). And no matter how the Eighth Circuit resolves *Brandt*, the split still persists. *Skrmetti*,

too, rejects the Fourth Circuit's approach. Opp.33. And the Eleventh Circuit deepened the split between the Fourth and Sixth Circuits by denying en banc rehearing on an Alabama law barring the use of cross-sex hormones on minors. *Eknes-Tucker*, 114 F.4th at 1241. Finally, it's not "confusing[]," Opp.33, that some of the cases Petitioners cite have been vacated or overturned given that the courts are squarely divided when it comes to how *Bostock* applies to the Equal Protection Clause. Accord App.99a (citing *Skrmetti*, *Eknes-Tucker*, and *Brandt*) (Richardson, J., dissenting).

These splits are real, ripe, and ready for this Court's review.

B. The Fourth Circuit is wrong.

Respondents have no evidence that West Virginia Medicaid's policy is mere pretext, so they resort to arguing that it's facial discrimination. But it takes Respondents 28 pages to get to the crux of this case—and this Court's decision in *Geduldig* v. *Aiello*. 417 U.S. 484 (1974). As Petitioners explained before, *Geduldig* rejected the notion that heightened scrutiny applies when a State declines to cover a particular condition that might line up with a protected trait. *Id.* at 496 n.20. And *Geduldig* is merely a medicine-specific application of a concept seen repeatedly in equal-protection law: a law doesn't *facially* discriminate by way of a proxy unless there's "no rational, nondiscriminatory" explanation for the law's use of the purported proxy. Pet.21.

Respondents can say only that *Geduldig* is a pregnancy-specific case, and the Court merely held that being pregnant is not closely related to being a woman. But this on-the-fly rewrite is nowhere to be found in *Geduldig*. Certainly, this Court has not understood the

case that way in recent years. See *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022) (citing *Geduldig* and explaining that, without pretext, "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny").

So like the Fourth Circuit, Respondents are forced to break new ground. Respondents tell us that *West Virginia Medicaid* must be discriminating based on sex because a *treating physician* must consider sex when making a diagnosis. Opp.24-25. Note the disconnect: West Virginia Medicaid is not the one interested in sex; the doctor is. And more to the point, this newfound rule would have rendered the exclusion in *Geduldig* unconstitutional, too, seeing as how sex plays a role in the medical judgments tied to pregnancy. Respondents also insist that treatments for different conditions are really all the same, so denying them for some must be transgender discrimination in disguise. Opp.27-28. This Court has never recognized transgender discrimination per se. But even if it did, it would be a bridge too far to say that a state program cannot consider a procedure's efficacy and expense in treating a particular condition just because that condition might align in some way with a person's status as a transgender person.

Respondents also try—unsuccessfully—to reshape this into a factual dispute. Opp.30-31. But one of Petitioners' central points is that the Fourth Circuit applied the wrong kind of scrutiny. In doing so, it thrust the court into the kind of factual disputes that should not decide this case. Under rational-basis review (which should have been applied), the particular motive behind the classification is beside the point; a choice can be based on "rational speculation unsupported by evidence or

empirical data." *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993). It is thus "constitutionally irrelevant" whether "plausible reasons" for a given action "in fact underlay the … decision." *R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980). So while West Virginia Medicaid believes it had actual reasons to act that were more than sufficient,[*] the Court need not agree to rule for it under rational-basis review.

The majority's defective reasoning on equal protection should not be permitted to stand.

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

A. The Medicaid Act ruling warrants review.

"[S]tates have broad discretion to structure fiscally workable Medicaid programs to serve the interests of the Medicaid population as a whole." App.122a (Richardson, J., dissenting). The majority erased that discretion by finding that West Virginia's coverage exclusion violates the Medicaid Act.

Respondents mostly ignore the circuit split over "whether all medically necessary services must be covered," Pet.26, rewriting the split to focus solely on "whether state-sponsored health plans that exclude medically necessary gender-affirming care for

[*] Even under intermediate scrutiny, the "question is not whether" West Virginia Medicaid's judgment was right "as an objective matter" but whether it was "reasonable." *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 211 (1997). Evidence on cost and efficacy provided reasonable justifications for West Virginia Medicaid's policy. See Amicus Curiae Br. of State of W. Va. at 16-23, *Fain* v. *Crouch*, No. 22-1927 (4th Cir. Nov. 7, 2022), ECF No. 24.

transgender people from coverage violate the Medicaid Act's comparability and availability requirements." Opp.21. Despite starting on a different path, Respondents arrive at the same place as Petitioners—the circuits are indeed split on how much flexibility States get in crafting their plans.

Respondents say, for example, that *Preterm, Inc.* v. *Dukakis*, 591 F.2d 121 (1st Cir. 1979), supports the Fourth Circuit's decision. Opp.21. But while Respondents focus on one part of the First Circuit's holding, *Preterm* unequivocally says that States *may* place reasonable limits on even "necessary" services. 591 F.2d at 124 (rejecting the argument that the Medicaid Act requires "that states provide all 'medically necessary' services"). The Fourth Circuit said otherwise. App.70a.

Likewise, Respondents overlook the key parts of *Smith* v. *Rasmussen*, 249 F.3d 755 (8th Cir. 2001). They believe it to be a fact-bound decision built on archaic medical evidence. Opp.21-22. But even if that were true (it's not), they lose sight of the relevant *legal* point: that a State could properly exclude coverage even though "sex reassignment surgery may be medically necessary in some cases." *Smith*, 249 F.3d at 761. Unlike the Fourth Circuit, the Eighth Circuit was willing to recognize that "evolving" and open questions on efficacy, particularly combined with "fiscal concerns," could justify excluding even medically necessary procedures. *Id.*; contra Pet.26 (citing *Bontrager* v. *Ind. Farm. Soc. Servs. Admin.*, 697 F.3d 604 (7th Cir. 2012) and *Hern* v. *Beye*, 57 F.3d 906 (10th Cir. 1995), which found that medically necessary services *must* be covered). Respondents ignore this split.

Respondents also forget that this Court's prior cases have expressly recognized States' broad discretion to set limits on covered procedures and to determine medical

necessity under Medicaid. See Pet.25. As Judge Richardson explained in dissent, this Court has said that the availability and comparability requirement provisions *must* be read alongside other provisions in the Medicaid Act—which, when read together—"impose a 'reasonableness' test much like a rational-basis test." App.121a, 123a. See also, *e.g.*, *Detgen ex rel. Detgen* v. *Janek*, 752 F.3d 627, 632-33 (5th Cir. 2014) (finding that even a "categorical exclusion" of a "medically necessary device" could be "eminently reasonable and thus consistent with the statutory language").

The majority below also ignored this context—it didn't "even try to parse the text of the statute or its implementing regulations." App.126a (Richardson, J., dissenting). On availability, the majority ignored that the Act's "objective" is to provide services "to serve a certain *population*," App.122a, so that sometimes categorically excluding a given service is permissible. And on comparability, the majority lost sight of how surgeries for gender dysphoria address *different* medical needs than facially similar surgeries do. Beyond summarizing what was said below, Respondents never address these defects. Nor do Respondents explain how the Fourth Circuit's decision is correct when it "negates the ability of the State to select which procedures, operations, and health risks it insures." App.132a (Wilkinson, J., dissenting).

B. The Section 1557 ruling warrants review.

Respondents try to shrink the circuit split on Title IX down to a split over Section 1557 of the ACA—even though Section 1557 expressly incorporates Title IX. Applying *Bostock* to Section 1557 will have consequences beyond insurance; the logic spills over into all sorts of contexts—living facilities, sports, and bathrooms. Pet.31.

And circuits are split over whether *Bostock*'s text-driven analysis applies only to Title VII or if it also extends to Title IX. See Pet.28 (citing *Pelcha* v. *MW Bancorp, Inc.*, 988 F.3d 318 (6th Cir. 2021)); Pet.31 (citing courts that declined to apply *Bostock*'s analysis to Title IX rule that purports to redefine "sex" to include "gender identity"); see also Pet.32 (citing *A.C. ex rel. M.C.* v. *Metro. Sch. Dist. of Martinsville,* 75 F.4th 760 (7th Cir. 2023), which applied *Bostock* to Title-IX claims).

By arguing that the Fourth Circuit "[f]aithfully appl[ied] this Court's decision in *Bostock*," Opp.17, Respondents recognize that this case is about more than Section 1557. If *Bostock* applied to Section 1557, it also would be right to apply it to other Title-IX-related contexts, as the Fourth Circuit does. See, *e.g.*, *B.P.J. ex rel. Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024). And in insisting that both their equal-protection and ACA claims turn on *Bostock*, Respondents effectively concede that those two claims are inextricably intertwined. Contra Opp.16.

Really, the Fourth Circuit was wrong to find that *Bostock* applies to Title IX. The statutes' texts are different. Pet.28. And Title VII and Title IX have very different contexts. While Title VII prohibits all differential treatment for various classifications, Title IX expressly permits separation "on the basis of sex" in certain circumstances. Pet.28. Respondents—like the majority below—never square *Bostock* with these exemptions. See also *Tennessee* v. *Becerra*, No. 1:24-CV-161, 2024 WL 3283887, at *10 (S.D. Miss. July 3, 2024) ("[T]he Court has found no basis for applying *Bostock*'s Title VII analysis to Section 1557's incorporation of Title IX."); *Texas* v. *Becerra*, No. 6:24-CV-211, 2024 WL 3297147, at *7 (E.D. Tex. July 3, 2024) ("[T]he Supreme

Court's reasoning in *Bostock* does not apply to Section 1557 or Title IX."); *Florida* v. *Dep't of Health & Hum. Servs.*, No. 8:24-CV-1080, 2024 WL 3537510, at *9-10 (M.D. Fla. July 3, 2024) (same).

Section 1557 does not apply because West Virginia's policy does not discriminate based on sex. It only declines to cover certain specific surgeries for all. The policy applies equally to both sexes and does not discriminate.

III. The Court Should Grant the Petition, Not Hold It for *Skrmetti*.

The Court should not hold this Petition for *Skrmetti*. Respondents acknowledge *Skrmetti* does not address the statutory questions here but argue that these questions "*disfavor*[] a grant of certiorari" because "there is no circuit split." Opp.22. As explained above, though, that's wrong.

Even on equal protection, it matters that this case concerns a state-funded health benefit plan exclusion rather than a blanket ban on sex-change treatments for minors. Opp.23. The level of scrutiny, the importance of a State's interest, and the relative "fit" between that interest and the State's solution *does* change when a State decides how to spend its resources. Pet.33. Among other things, States "have a legitimate interest in sound fiscal planning." *McKesson Corp.* v. *Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990). That's distinct from their "interest in safeguarding the physical and psychological well-being of a minor" which is "compelling." *New York* v. *Ferber*, 458 U.S. 747, 756-57 (1982) (cleaned up). So this case complements—but doesn't copy—*Skrmetti*.

Beyond all that, resolving these questions would provide broader clarity to public and private actors, which favors certiorari. While Respondents claim this private-public divide has "no doctrinal relevance to any of the issues presented in these cases," Opp.23, that ignores the practical effect of the Fourth Circuit's decision. While *Skrmetti* may help resolve the equal-protection issue here, insurers—and governments, and patients, and courts—will still be left adrift without the more specific direction that only this case can provide.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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