No. 24-99

In the
Supreme Court of the United States

DALE FOLWELL, in his official capacity as State Treasurer of North Carolina, et al.,

Petitioners,

v.

MAXWELL KADEL, et al.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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November 13, 2024

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REPLY BRIEF

The en banc Fourth Circuit held that the North Carolina State Health Plan for Teachers and State Employees violated the Equal Protection Clause by refusing to provide insurance coverage for treatments "leading to or in connection with sex changes." That decision conflicts with decisions from several other circuits and is both profoundly wrong and profoundly important. It merits this Court's review.

Respondents come nowhere close to refuting any of those points. They do not deny that courts are divided over whether laws that prohibit access to or restrict insurance coverage for sex-change treatments violate the Equal Protection Clause. And they have no persuasive argument that the Fourth Circuit lies on the right side of the divide. Nor do they deny that the equal-protection question is of national importance. This Court recognized as much when it granted certiorari in *United States v. Skrmetti*, No. 23-477, to consider similar issues.

Respondents instead spend most of their brief insisting that this case is a poor vehicle for resolving the equal-protection question because the Fourth Circuit held that the *West Virginia* Medicaid Plan also violates the Affordable Care Act and the Medicaid Act. But those holdings did not address *North Carolina's* Plan, so they are no obstacle to review of the court's equal-protection holding in *this* case. And in all events, because respondents themselves have always treated the ACA sex-discrimination analysis as derivative of the equal-protection analysis, reversing the Fourth Circuit's equal-protection holding would compel dismissal of their ACA claim too. The Court

accordingly should grant plenary review to consider this case alongside *Skrmetti*, but at a minimum, should hold this case for *Skrmetti*. One way or another, the Court should not allow the Fourth Circuit's flawed decision to be the last word on an issue that demands a sensible and uniform national answer.

I. The Decision Below Entrenches Two Circuit Splits.

1. Respondents do not seriously dispute that the courts of appeals are divided over whether state restrictions on access to or denials of insurance coverage for sex-change treatments discriminate on the basis of sex. Like the Fourth Circuit, the Eighth Circuit has held that they trigger and likely fail intermediate scrutiny. *See Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). By contrast, the Sixth and Eleventh Circuits have held that they trigger only rational-basis review, which they likely survive. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023); *Eknes-Tucker v. Gov. of Ala.*, 80 F.4th 1205 (11th Cir. 2023). And since this petition was filed, the split has become more entrenched, as the Eleventh Circuit denied en banc review in *Eknes-Tucker* and issued five opinions discussing the issues. *See* 114 F.4th 1241 (11th Cir. Aug. 8, 2024).

Respondents emphasize that those decisions involved bans on sex-change treatments for minors, not denials of insurance coverage. BIO.32. But they do not explain why that matters. The underlying equal-protection question is the same: whether treating sex-change treatments differently from other kinds of medical treatments discriminates on the basis

of sex. Respondents do not dispute that if this case had arisen in the Sixth or Eleventh Circuits, the Plan's coverage exclusion would have been subject to rational-basis review, which it almost certainly would have survived.

Respondents note that the Eighth Circuit granted initial en banc review of the permanent injunction in *Brandt*. BIO.33. But no matter how the Eighth Circuit resolves that case, the conflict between the circuits will persist because the en banc Fourth Circuit has staked out a diametrically different position from the Sixth and Eleventh Circuits. And if the Eighth Circuit ultimately agrees with the Sixth and Eleventh Circuits, the Fourth Circuit's decision will just be more of an outlier, making review here all the more appropriate. While respondents note that other federal courts are currently considering challenges to state refusals to provide insurance coverage for sex-change treatments, BIO.33 (citing *Dekker v. Sec'y, Fla. Agency for Health Care Admin.*, No. 23-12155 (11th Cir.)), that just guarantees that the conflict will persist.

2. Respondents claim that there is no circuit split over whether transgender individuals are a suspect or quasi-suspect class. That contention is puzzling. Like the Fourth Circuit, Pet.App.22-23, the Ninth Circuit has squarely held that "gender identity is at least a 'quasi-suspect class.'" *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2024). Those decisions conflict with the Sixth Circuit's holding that it is not. Respondents claim that *Skrmetti* "stopped short of deciding the issue." BIO.34. But that is not a fair reading of the Sixth Circuit's opinion, which squarely held that

"rational basis review applies" because "neither the Supreme Court nor this Court has recognized transgender status as a suspect class." *Skrmetti*, 83 F.4th at 486; *see also* Cert. Pet. 30, No. 23-477 (U.S. filed Nov. 6, 2023) (arguing that "the Sixth Circuit's holding that transgender individuals do not constitute a quasi-suspect class created a square conflict with the Fourth and Ninth Circuits").

II. The Decision Below Gets A Profoundly Important Question Profoundly Wrong.

1. Respondents offer no persuasive defense of the Fourth Circuit's conclusion that the Plan discriminates on the basis of sex. Whether the Plan covers a drug or procedure does not turn on whether the patient is a man or a woman; it turns on what kind of treatment the patient seeks. Pet.20-24. This Court has long held that distinctions based on medical treatments trigger rational-basis review, even if a particular treatment is sought disproportionally (or even exclusively) by one sex. Pet.22-24 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), and *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236-37 (2022)).

Respondents do not seriously dispute that the coverage exclusion principally distinguishes between medical treatments. They nevertheless argue that the Plan discriminates based on sex because it purportedly covers "gender-affirming care" "for cisgender people," while "exclud[ing] the same care for transgender individuals for purposes of gender transition." BIO.24-25. And because determining whether an individual is "cisgender" or "transgender" requires a comparison of the "patient's sex assigned at

birth" and the patient's "gender identity," "the coverage decision depends on the sex of the patient." BIO.24-25. Each step in that chain is wrong.

First, the Plan does not cover "gender-affirming care" for "cisgender individuals" but not "transgender individuals." BIO.25. The Plan does not cover "gender-affirming" treatments for *anyone*—regardless whether the patient is male or female, transgender or not. The Plan does not cover breast reconstruction surgery or a vaginoplasty for a biological female who wishes to look more feminine. Nor does it cover breast reduction surgery or testosterone therapy for a biological male who wishes to look more masculine. It covers those procedures and drugs to treat *specific medical conditions*, such as breast cancer, physical injury to the vagina, hypogonadism, or symptomatic gynecomastia. Pet.25-26.

Like the Fourth Circuit, respondents try to elide that conclusion by declaring any treatment that has the *effect* of "align[ing] a patient's gender presentation" with the patient's preferred sex a form of "gender-affirming care." BIO.24-25. Only then can they claim that a vaginoplasty for a biological female who wishes to correct a congenital birth defect is "the same" treatment as a vaginoplasty for a biological male who wishes to change his sex. BIO.24-25. But properly classifying treatments requires considering purposes as well as effects and failing to do so posits a false equivalence between treatments that are obviously not "the same." BIO.24. A vaginoplasty to correct a congenital birth defect or to repair a physical injury to the vagina during childbirth is not "the same care" as a vaginoplasty to create an artificial vagina in

a biological man. Pet.24-25. Testosterone therapy to treat hypogonadism in a biological male is not "the same care" as testosterone therapy to facilitate a sex change, which is why the FDA has approved the former but not the latter. Pet.25. Each involves different treatment for different medical conditions, and each entails different risks, benefits, and cost considerations. Pet.26. Declaring all those treatments "the same care" defies reality.

Respondents do not deny that, by their logic, it would be sex discrimination to cover chest reconstruction surgery for a biological male who wishes to change his sex, but not a biological female who wishes to augment her breasts to look more feminine. Likewise, it would be sex discrimination to cover testosterone therapy for a biological female who wishes to change her sex, but not a biological male who wishes to build more muscle to look more masculine. Pet.26. After all, under respondents' (il)logic, each of those choices would treat men and women differently by denying one sex "the same" "gender-affirming care" that the other sex may obtain. BIO.24-25.

All that illustrates why it makes no sense to label patently different treatments "the same" "gender-affirming care." BIO.24-25. And it illustrates why the Plan does not "provide dissimilar treatment for men and women who are similarly situated." *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). Respondents' only response is to accuse petitioners of trying to "relitigate factual questions" that the lower courts decided in respondents' favor. BIO.30. To the contrary, even the Fourth Circuit acknowledged that people who seek drugs and surgeries to facilitate a sex

change might not be similarly situated to patients who seek similar drugs or surgeries for different conditions. Pet.App.44. It just held as a matter of law that "there is no threshold similarly situated inquiry in the equal-protection analysis," Pet.App.44—a conclusion that respondents pointedly do not defend.

Shifting gears, respondents argue that the Plan's exclusion "cannot be applied without referencing sex." BIO.24-25 (citing *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020)). Even assuming *Bostock*'s reasoning should apply in the equal-protection context, *but see* Pet.27-28, respondents' premise is once again wrong. While respondents insist that one must know an individual's sex to determine whether the individual is transgender, BIO.25, they do not appear to dispute that one need only know the patient's proposed course of treatment and diagnosis to determine whether the coverage exclusion applies, Pet.28. And, as just explained, the Plan does not pay for "gender-affirming care" for anyone—male or female, transgender or not.

To be sure, the ultimate effect of the coverage exclusion is to exclude some treatments sought only by biological men, and some treatments sought only by biological women. Pet.21-22. But the "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretext designed to effect an invidious discrimination against members of one sex or the other.'" *Dobbs*, 597 U.S. at 236-37 (quoting *Geduldig*, 417 U.S. at 496 n.20). Respondents do not even try to argue that the Plan adopted the coverage exclusion because of animus toward one of the sexes. They instead try to distinguish *Geduldig* (and *Dobbs*)

on the ground that it addressed "pregnancy-related issues." BIO.29. But pregnancy provides an apt analogy, and this Court has applied *Geduldig*'s reasoning outside the pregnancy context. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 270-73 (1979) (rejecting equal protection challenge to a law giving employment preference to military veterans, a class that was over 98% male). So that argument gets them nowhere.

2. The Fourth Circuit likewise erred in holding that the Plan discriminates against transgender individuals. The Plan does not deny coverage to anyone because they are transgender; transgender people can receive hormone therapy, hysterectomies, chest reconstruction surgeries, and vaginoplasties so long as they have a covered diagnosis. Respondents dispute none of that, but they nevertheless insist that the Plan discriminates against "transgender people" because it "target[s] treatments exclusively when sought by transgender people." BIO.28. To the extent respondents are suggesting that the Plan refuses to cover "sex change" treatments only when those treatments are sought by individuals who identify as transgender, that is incorrect: The Plan excludes coverage for "sex change" treatments regardless of whether the patient identifies as transgender.

To the extent respondents suggest that the Plan discriminates against transgender individuals by excluding coverage for treatments exclusively sought by transgender people, that does not work either. Even accepting respondents' premise, *but see* Pet.30-31, that reasoning runs headlong into *Geduldig* and *Dobbs*. Those cases hold that regulating a medical

procedure that only one group can undergo does not trigger heightened scrutiny absent proof that singling out that particular procedure is pretext for invidious discrimination against that group. Pet.30-31. Of course, "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). But just as there is no basis to presume that singling out pregnancy (or abortion) is a smokescreen for invidious discrimination against women, *see Dobbs*, 597 U.S. at 236-37; *Geduldig*, 417 U.S. at 496 n.20, there is no basis to presume that excluding some (but not all) gender-dysphoria treatments is a smokescreen for invidious discrimination against transgender individuals. There are many rational reasons not to pay for sex-change treatments, *see* States Amicus.Br.3-13, a reality that respondents do not even try to deny.

In all events, even if the coverage exclusion did discriminate against transgender individuals, the Fourth Circuit was wrong to declare transgender individuals a quasi-suspect class. Pet.31-32. Respondents insist that transgender individuals are a "discrete group" defined by "obvious, immutable, or distinguishing characteristics." BIO.27. But there is little "science" suggesting that "transgender identity is biologically caused, fixed from early life, and eternally present in an unchanging manner." CA4.JA649. The existence of "detransitioners" is powerful evidence that it is not. *Skrmetti*, 83 F.4th at 487. Nor is it obvious that transgender individuals are

a "discrete group." WPATH's own guidebook concedes that the term "transgender" can describe "a huge variety of gender identities and expressions," E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. of Transgender Health S1, S15 (2022), including everything from "people whose genders are comprised of more than one gender identity simultaneously or at different times (e.g., bigender), who do not have a gender identity or have a neutral gender identity (e.g., agender or neutrois), have gender identities that encompass or blend elements of other genders (e.g., polygender, demiboy, demigirl), and/or who have gender that changes over time (e.g., genderfluid)." *Id.* at S80. Respondents fail to grapple with any of that.

3. Even if the Plan's coverage policy triggered heightened scrutiny, North Carolina would satisfy it. Respondents resist that conclusion, arguing that petitioners may not "relitigate" the Fourth Circuit's "fact-specific conclusion" that they failed to establish that "gender-dysphoria treatments are ineffective." BIO.26-27. But the state need not prove that such treatments are ineffective to satisfy intermediate scrutiny. The state has an obviously important interest in declining to facilitate medical treatments with *uncertain* efficacy. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); States Amicus.Br.13-16. And even the Fourth Circuit acknowledged that "gender-dysphoria treatments are … still developing." Pet.App.51; *see* EPPC Amicus.Br.6-14.

III. The Question Presented Is Important, And This Is An Excellent Vehicle To Resolve It.

Respondents do not dispute that the question presented is exceedingly important and merits this Court's review. Nor could they, as the Court has already granted review of similar issues in *Skrmetti*. If anything, the stakes here are even higher. While only a handful of states have enacted laws like the one in *Skrmetti*, at least two dozen state Medicaid and employee health plans restrict coverage for sex-change treatments. Pet.34. While *Skrmetti* implicates puberty blockers and hormones for minors, this case implicates *any* sex-change treatment for *every* beneficiary of a state Medicaid or employee benefit plan. And while *Skrmetti* involves a preliminary injunction, this case involves a permanent injunction, issued after the parties engaged in years of discovery and compiled an extensive factual record.

Respondents nevertheless insist that this case is not a suitable vehicle to resolve the equal-protection question because "the underlying injunctions are supported by the lower courts' separate conclusions that the Plans violate the ACA and the Medicaid Act." BIO.16. But the Fourth Circuit's ACA and Medicaid Act holdings apply only to *West Virginia*'s Medicaid Plan. Pet.App.61-68. They are therefore no obstacle to review of the equal-protection issue in *this* case.

To be sure, respondents' ACA claim remains pending in district court.[1] But that is neither an

[1] While petitioners' appeal of the permanent injunction on the equal-protection issue was pending, the district court granted summary judgment to respondents on their ACA claim. The

obstacle to review nor a good reason to deny it. After all, this Court routinely grants review of important issues on which the courts of appeals are divided even when the plaintiffs have additional claims pending in the lower courts. *See, e.g.*, *Moody v. NetChoice, LLC*, 144 S.Ct. 2383 (2024) (reviewing First Amendment question even though the plaintiffs had preemption and vagueness arguments pending in district court). And granting review would actually *facilitate* resolution of the ACA issue, as respondents do not dispute that reversing the Fourth Circuit's equal-protection holding would likely resolve the ACA issue in petitioners' favor. After all, respondents have always treated the ACA sex-discrimination analysis as derivative of the equal-protection analysis, *see* CA4.JA313 ("Plaintiffs have been subjected to discrimination in the provision of healthcare services on the basis of sex for all the reasons described above."), and the Fourth Circuit did too. Pet.App.61-68. So if this Court concludes (as it should) that the North Carolina Plan does not discriminate on the basis of sex for equal-protection purposes, then respondents would be left with no plausible argument that the Plan discriminates on the basis of sex under the ACA.

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parties are currently awaiting a trial on damages. *See Kadel v. Folwell*, 2022 WL 17415050 (M.D.N.C. Dec. 5, 2022).

CONCLUSION

This Court should grant the petition, or at a minimum hold it for *Skrmetti*.

Respectfully submitted,

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