No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Like all health benefit plans, the North Carolina State Health Plan for Teachers and State Employees must make difficult choices about what treatments to cover. The Plan contains many exclusions, including for cosmetic services, experimental medications, and surgery for psychological reasons. This case concerns the Plan's longstanding exclusion for treatments "leading to or in connection with sex changes or modifications and related care."

Respondents are individuals diagnosed with gender dysphoria. They filed this suit alleging that the Plan violated the Equal Protection Clause by refusing to cover drugs and surgeries they sought to treat that condition. A sharply divided en banc Fourth Circuit agreed. In doing so, the court not only doubled down on its view that transgender people are a "quasi-suspect class," but held that categorically refusing to cover sex-change treatments for *anyone*, no matter their sex, discriminates on the basis of sex. That decision reinforces two circuit splits and defies this Court's repeated holdings that "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 v. Jackson Women's Health Org.*, 597 U.S. 215, 236-37 (2022) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

The question presented is:

Whether a State's decision to decline to provide health benefit coverage for treatments leading to sex changes violates the Equal Protection Clause.

PARTIES TO THE PROCEEDING

Petitioners Dale R. Folwell, CPA, in his capacity as State Treasurer of North Carolina, and the Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees, were defendants-appellants below.

Respondents Maxwell Kadel, Jason Fleck, Connor Thonen-Fleck, Julia McKeown, Michael D. Bunting, Jr., C.B., by his next friends and parents, Sam Silvaine, and Dana Caraway were plaintiffs-appellees below.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Kadel v. Folwell*, No. 1:19-cv-272 (M.D.N.C.), permanent injunction entered on June 10, 2022. The court issued a corrected version on August 10, 2022.
- *Kadel v. Folwell*, No. 22-1721 (4th Cir.), judgment entered on April 29, 2024.[1]

[1] On appeal, the Fourth Circuit resolved this case and a similar one out of West Virginia in a single opinion. *See Anderson v. Crouch*, No. 22-1927 (4th Cir.).

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PETITION FOR WRIT OF CERTIORARI

Over the past few years, doctors, public health officials, and people across the world have engaged in spirited debate about the use of medical interventions, including hormone treatments and surgical procedures, to alter aspects of one's biological sex. Some have advocated these interventions to treat the growing phenomenon of gender dysphoria. Others have expressed caution given their permanent effects and questions about their efficacy. Unsurprisingly, health benefit plans across the country have taken different approaches when deciding whether and how to cover such treatments. For decades, the North Carolina State Health Plan for Teachers and State Employees has chosen to exclude coverage for treatments "leading to or in connection with sex changes or modifications." App.2. That exclusion is one of many in the Plan, which also excludes coverage for cosmetic services, experimental treatments, surgery for psychological or emotional reasons, and more. CA4.JA178-82. Each of those choices is designed to ensure that the Plan can provide the best possible coverage for all 740,000 of its members at a reasonable cost.

In the decision below, the en banc Fourth Circuit concluded that North Carolina's coverage choices violate the Equal Protection Clause and permanently enjoined the State from excluding coverage for sex-change treatments. That decision is seriously flawed. North Carolina's exclusion of coverage for sex-change treatments does not draw any classifications based on any protected trait. It distinguishes between *medical treatments*. Sex changes and treatments leading to

them fall on the uncovered side of the line, along with cosmetic services, experimental treatments, and surgeries for psychological or emotional reasons. Other treatments, including treatments for cancer, congenital birth defects, and hypogonadism, fall on the covered side of the line. 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 of the sexes. Excluding pregnancy-related disabilities from insurance coverage is not sex discrimination even though only women can get pregnant. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974). Restricting abortion is not sex discrimination even though only women undergo abortions. *See Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236-37 (2022). Absent proof that those choices are a smokescreen for invidious discrimination, decisions about what medical procedures to permit or insure are for States and other insurers, not the federal judiciary, to make.

The Fourth Circuit's decision deviates from that established tradition and merits this Court's plenary review. The decision deepens a conflict among the courts of appeals about whether laws targeting sex-change treatments trigger heightened scrutiny. The decision is egregiously wrong, and the question presented is profoundly important. Indeed, this Court already recognized that related issues merit review in granting certiorari in *United States v. Skrmetti*, No. 23-477, which involves an equal-protection challenge to a Tennessee law banning sex-change hormones and puberty blockers for minors. At a minimum, the Court should hold this case for *Skrmetti*. But the case for

plenary review is even stronger here. Whatever ability States may have to ban certain procedures altogether, whether States must pay for those procedures under benefit plans that exclude many treatments is a different and easier question. And the Fourth Circuit's decision affects similar policy exclusions in dozens of state Medicaid and employee benefit plans across the country. Granting plenary review would give the Court an opportunity to resolve critical questions about the constitutionality of those choices, and to consider the equal-protection issues on a more fully developed record. But one way or another, the Court should not let the sharply divided decision below be the last word on the constitutionality of North Carolina's Plan.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 100 F.4th 122 and reproduced at App.1-159. The district court's order is reported at 620 F.Supp.3d 339 and reproduced at App.160-244.

JURISDICTION

The Fourth Circuit issued its opinion on April 29, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

A. Legal and Factual Background

The North Carolina State Health Plan for Teachers and State Employees is the largest purchaser of healthcare and pharmaceuticals in North Carolina, funding healthcare for more than 740,000 state and local government employees, retirees, and their dependents. CA4.JA154, 159-60, 167. Like all health benefit providers, the Plan has finite resources to spend on healthcare, so it must make difficult choices about what treatments to cover. Those choices turn in large part on the State's assessment of the benefits of covering a treatment versus its costs. While a treatment must be medically necessary for the Plan to cover it, the Plan does not cover all medically necessary treatments. CA4.JA165. Instead, it prioritizes the most cost-effective treatments that benefit the greatest number of Plan members. CA4.JA164-65, 172-73. Some treatments are too expensive to cover (e.g., Ozempic for weight loss), others are too experimental or unproven (e.g., acupuncture), still others benefit too few Plan participants (e.g., special infant formula). CA4.JA164, 172.

Since the 1990s, the Plan has excluded coverage for "[t]reatment or studies leading to or in connection with sex changes or modifications and related care." App.6.[2] Under the policy, the Plan will not cover

[2] In response to a 2016 rule proposed by the U.S. Department of Health and Human Services prohibiting "categorical coverage exclusions or limitations for all health services related to gender transition," App.6, the Plan temporarily suspended the policy for

testosterone treatment designed to help a biological woman appear more like a biological man. Nor will it cover vaginoplasty, hysterectomy, penectomy, mastectomy, or breast reconstruction surgery to facilitate a sex change. In contrast, the Plan will cover the use of hormones or some types of those surgeries to treat other conditions. For example, the Plan covers testosterone therapy for any use approved by the U.S. Food and Drug Administration, such as to treat primary hypogonadism. CA4.JA988. And it covers testosterone therapy to treat metastatic mammary cancer. CA4.JA988. Likewise, the Plan will cover mastectomies and breast reconstruction surgery to treat breast cancer and macromastia. CA4.JA587. And it will cover vaginoplasties to treat congenital birth defects or physical injury to the vagina, such as injuries suffered during childbirth. CA4.JA591-92. So long as a patient has a qualifying diagnosis, the Plan will cover the proposed treatment regardless of the patient's sex or transgender status.

While there is no evidence as to why the Plan adopted that policy back in the 1990s, the decision to maintain that longstanding status quo reflects the unsettled nature of ongoing debate in the medical community. As one of the State's experts explained, there are "currently widely varying views concerning both the causes of and appropriate therapeutic response to gender dysphoria." CA4.JA628. "Existing studies do not provide a basis for a reliable scientific

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the 2017 Plan year. After the rule was enjoined, *see Franciscan Alliance, Inc. v. Burwell*, 227 F.Supp.3d 660, 695-96 (N.D. Tex. 2016), the temporary suspension lapsed, and in 2018 the Plan reverted to its longstanding policy. CA4.JA611, 614, 4689-90.

conclusion as to which therapeutic responses result in the best long-term outcomes for affected individuals." CA4.JA628. "The knowledge base concerning the cause and treatment of gender dysphoria available today has been repeatedly characterized in multiple reviews as of 'low scientific quality.'" CA4.JA629. Gender "affirmation treatments remain experimental and have never been accepted by the relevant scientific community and have no known or published error rate." CA4.JA631-32.

To be sure, "some offer authoritative opinions" on the best way to treat gender dysphoria. CA4.JA634. Several American medical organizations, for example, have endorsed treatment protocols set by the World Professional Association for Transgender Healthcare (WPATH). But those protocols "are not scientifically proven." CA4.JA634. Dr. Stephen Levine, a licensed psychiatrist at Case Western Reserve University School of Medicine and a member of WPATH for almost 20 years, explained below that WPATH has become "a voluntary membership, activist advocacy organization." CA4.JA657. Indeed, WPATH views itself as "not merely a scientific organization, but also as an advocacy organization." CA4.JA657. "These are obviously, conflicted, incompatible, and contradictory goals." CA4.JA657. It is thus no surprise that several courts have recognized that "the WPATH Standards of Care reflect not consensus, but merely one side in a sharply contested medical debate." *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019); *see also, e.g.*, *Kosilek v. Spencer*, 774 F.3d 63, 77-79, 90 (1st Cir. 2014) (similar). In fact, until recently, the U.S. Department of Health and Human Services warned against "rel[ying] excessively on the conclusions of an

advocacy group (WPATH) rather than on independent scientific fact-finding." Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37198 (June 19, 2020).[3]

B. Procedural Background

Respondents Maxwell Kadel, Connor Thonen-Fleck, C.B., Julia McKeown, and Dana Caraway are individuals who have been diagnosed with gender dysphoria. They allege that the Plan violated the Equal Protection Clause by refusing to cover treatments they sought for their dysphoria diagnosis. Kadel, a biological female who identifies as a male, alleges that the Plan refused to cover testosterone therapy and chest reconstruction surgery. CA4.JA325-27. Thonen-Fleck, a biological female who identifies as a male, also alleges that the Plan refused to cover testosterone therapy and chest reconstruction surgery. CA4.JA351-53. C.B., a biological female who identifies as a male, alleges that the Plan refused to cover testosterone therapy. CA4.JA414-15. McKeown, a biological male who identifies as a female, claims that the Plan refused to cover a vaginoplasty. CA4.JA377-78. And Caraway, a biological male who identifies as a female, claims that the Plan refused to

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[3] Recent reporting has also called into question whether WPATH's recommendations are rooted in science or based on advocacy. *See* A. Ghorayshi, *Biden Officials Pushed to Remove Age Limits for Trans Surgery, Documents Show*, N.Y. Times (June 25, 2024) https://tinyurl.com/4kerbxyz; A. Sibarium, *Top Transgender Health Group Said Hormones, Surgeries Were 'Medically Necessary' So That Insurance Would Cover Them, Documents Show*, Washington Free Beacon (July 23, 2024) https://tinyurl.com/5cywdwvr.

cover hormone therapy, "top and bottom surgery," "vocal feminization surgery," and "facial feminization surgery." CA4.JA454-56.

Respondents sued in federal court challenging the Plan's exclusion of "[t]reatment or studies leading to or in connection with sex changes or modifications and related care," arguing (among other things) that it violates the Equal Protection Clause. The district court granted them summary judgment on their equal-protection claim, concluding that refusing to cover their requested treatments discriminates based on sex and transgender status.[4] App.219. The court then issued a permanent injunction prohibiting petitioners from enforcing the Plan's exclusion of "[t]reatment or studies leading to or in connection with sex changes or modifications and related care" and ordering the Plan to cover "medically necessary services for the treatment of gender dysphoria." App.236-37.

Three months after a three-judge panel heard oral argument, the Fourth Circuit sua sponte slated this case for initial en banc review and ordered that it be argued alongside *Anderson v. Crouch*, No. 22-1927, an

[4] Respondents also allege that the coverage decisions violated the Affordable Care Act, which provides that "an individual shall not, on the ground prohibited under title VI … [or] title IX, … be denied the benefits of, or be subjected to discrimination under, any health program or activity … receiving Federal financial assistance." 42 U.S.C. §18116(a). The district court initially deferred judgment on that claim. App.234-35. But after petitioners appealed the court's permanent injunction on the equal-protection claim, the court granted respondents summary judgment on their Affordable Care Act claim too. D.Ct.Dkt.276. The parties are currently awaiting a trial on damages.

appeal from a decision granting summary judgment to the plaintiffs on their equal-protection challenge to the West Virginia State Medicaid Program's exclusion of coverage for "[t]ranssexual" or "[s]ex change" surgeries. App.2-4. The Fourth Circuit ultimately affirmed both decisions in a single opinion by an 8-to-6 vote. App.2-4.

The majority began its analysis by reiterating its holding in *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), that "discrimination on the basis of gender identity is subject to heightened scrutiny" because "transgender people constitute a quasi-suspect class." App.22-23. It then concluded that the coverage exclusions discriminate against transgender people. The majority acknowledged that the exclusions do "not explicitly mention transgender *people*." App.23. "Instead, they mention the types of treatments that are not covered," i.e., treatments "leading to or in connection with sex changes." App.23. But because those are "treatments for gender dysphoria," the court reasoned that they are a proxy for people suffering from gender dysphoria, which it in turn deemed a "proxy for transgender identity." App.24. Although the court recognized that not "all transgender people are diagnosed with gender dysphoria," and that "not all people with gender dysphoria seek gender-affirming surgery," App.24, it nevertheless determined that "gender dysphoria is so intimately related to transgender status as to be virtually indistinguishable from it." App.30.

The majority acknowledged that this Court held in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that excluding coverage for a procedure that only one group

can obtain (there, pregnancy) is not discrimination against that group absent evidence that the exclusion is a smokescreen for invidious discrimination. But it maintained that this Court "has only relied on *Geduldig* to reject proxy-based arguments where pregnancy was at issue." App.29; *but see Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236-37 (2022) (rejecting equal-protection challenge to a law restricting abortion); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 270 (1979) (rejecting equal-protection challenge to a law giving employment preference to military veterans, a class that was over 98% male). The majority further posited that *Geduldig* held only that "pregnancy is an insufficiently close proxy for sex," and that the "same cannot be said for the inextricable categories of gender dysphoria and transgender status." App.29.

The majority also concluded that the coverage exclusions discriminate based on sex. App.43-47. Again, the court did not dispute that the exclusions turn on what treatment an individual seeks for what diagnosis. But it nevertheless concluded that they discriminate based on sex because those "assigned female at birth can receive vaginoplasty and breast reconstruction for gender-affirming purposes, but those assigned male at birth cannot," and "those assigned male at birth can receive a mastectomy for gender-affirming purposes, but those assigned female at birth cannot." App.44.

The court acknowledged petitioners' argument that a biological female seeking a vaginoplasty to treat a congenital birth defect and a biological female seeking breast reconstruction surgery to treat breast

cancer are not similarly situated to a biological male seeking surgical intervention to alter aspects of his biological sex. App.44. But the court deemed that irrelevant when deciding whether heightened scrutiny applies. App.47-50. In its view, whether two comparators are similarly situated is not part of the "threshold inquiry" into whether heightened scrutiny applies, but something to be assessed when deciding whether "the governmental interest for discrimination is justified" under intermediate scrutiny. App.47-50.

Yet when it turned to intermediate scrutiny, the majority ignored the similarly-situated inquiry altogether. App.50-52. The court acknowledged that States have an important interest in protecting their citizens from "ineffective medicine." App.51. But it concluded that the Plan's coverage decisions are not substantially related to that end. App.51. Though petitioners presented considerable evidence questioning the efficacy of sex-change treatments, the court summarily declared that the evidence does "not support the notion that gender-dysphoria treatments are ineffective so much as still developing." App.51.[5]

Judge Richardson authored a dissent in which Judges Wilkinson, Niemeyer, and Quattlebaum joined in whole and Judges Agee and Rushing joined in substantial part. App.69-127. Because the Plan's coverage decisions turn on the diagnosis and treatment sought, not sex or transgender status, Judge Richardson would have assessed them under rational-basis review. The Plan, he explained,

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[5] The Fourth Circuit went on to hold that the West Virginia exclusion violates the Medicaid Act and §1557 of the Affordable Care Act. App.61-68.

includes a "list of acceptable diagnoses that would entitle a person to coverage for each service." App.88. "Every person—regardless of their sex, gender identity, or combination thereof—will be covered if they seek that service for one of those diagnoses." App.88. "And no person—regardless of their sex, gender identity, or combination thereof—will be covered if they seek that service for a diagnosis that's not on the list, such as gender dysphoria." App.88.

Judge Richardson rejected the majority's conclusion that the Plan uses gender dysphoria as a proxy for transgender status. A law that "targets something closely or exclusively associated with a protected class" triggers heightened scrutiny only when the distinction is "so irrational that nothing could explain it other than an intent to discriminate" against that class. App.93. But even accepting that transgender status is a protected class, he concluded that refusing to cover sex-change treatments is not so irrational that it could be explained only by an intent to discriminate against transgender individuals. App.93-94. States have finite and diminishing resources to spend on healthcare and must make difficult decisions about how to spend them. App.93-94. And North Carolina could reasonably decide that these treatments are not cost-justified, particularly given the ongoing debate about their efficacy. App.93-94.

Judge Richardson likewise rejected the majority's conclusion that the coverage exclusions discriminate based on sex. A biological male who seeks a mastectomy to treat gynecomastia, he explained, is not similarly situated to a biological female who seeks

a mastectomy for a sex change. App.116-17. Likewise, a biological female who seeks vaginoplasty surgery to treat a congenital birth defect is not similarly situated to a biological man who seeks vaginoplasty surgery for a sex change. App.117-18. Only by wrongly deeming those very different situations similar, he explained, could the "majority sidestep the determinative role diagnosis plays and characterize these coverage decisions as necessarily sex-based." App.118.

Judge Wilkinson likewise dissented, App.128-40, lamenting that the majority's approach "leaves little room for a national dialogue about relatively novel treatments with substantial medical and moral implications." App.130-31. By removing the question from the democratic process and "constitutionally mandating state-funded transgender rights," the majority was engaging in "substantive equal protection." App.129. Judge Quattlebaum dissented to explain that the district court erred both by excluding testimony from one of the State's expert witnesses and by declaring "that there is a consensus of the medical community on the treatment of gender dysphoria when the record indicates otherwise." App.140-59.

REASONS FOR GRANTING THE PETITION

This case presents a clean split of authority on hotly contested issues that demand this Court's resolution. Doctors, public health authorities, and people across the country disagree sharply about the appropriate use of medical interventions to alter the physical attributes of one's biological sex. Some champion them to address the rising phenomenon of gender dysphoria. Others urge caution due to the

permanent nature of the treatments and their uncertain efficacy. In light of that unsettled debate, numerous health benefit plans across the country—both private and state-run—have declined to cover some or all medical treatments designed to alter attributes of the patient's biological sex until a clearer consensus emerges. Yet the decision below pretermits that debate and overrides those judgments by holding that the Equal Protection Clause *requires* every state Medicaid plan and state employee benefits plan in the country to pay for such treatments.

That decision is wrong, and it conflicts with decisions from multiple courts of appeals. And whether and when States may restrict or limit health coverage for these controversial treatments is a profoundly important question. This Court is poised to consider related questions in *United States v. Skrmetti*, No. 23-477, and at a minimum it should hold this petition for that case. But there are strong reasons to grant plenary review here too, as the issue here implicates the longstanding policies of multiple States. Moreover, whatever the propriety of banning such treatments, whether and to what extent the States must *pay* for them is a different and easier question. But one way or another, the Court should not leave the decision below standing.

I. The Decision Below Entrenches Two Circuit Splits.

Courts throughout the country are grappling with disputes over the constitutionality of laws that restrict access to or deny insurance coverage for sex-change treatments. Their efforts have generated two circuit splits, and the decision below deepens both. First, the

decision exacerbates disagreement over whether such laws discriminate on the basis of sex. Like the Fourth Circuit, the Eighth Circuit has concluded that they do, and so subjected them to intermediate scrutiny, which both courts found they fail. By contrast, the Sixth and Eleventh Circuits have concluded that they do not, and have therefore upheld them under rational-basis review. The decision below also deepens a conflict about whether transgender individuals constitute a quasi-suspect class, which likewise has proven dispositive at the scrutiny stage in multiple contexts. The Court has already granted certiorari in *Skrmetti* to consider these questions in the context of bans on sex-change treatments for minors. This case provides an opportunity to consider them in the equally important and distinct context of state-funded health benefit plans. And considering this case and *Skrmetti* in tandem, or at least in the same Term, could facilitate this Court's consideration of important doctrinal questions that have split the circuits.

1. Like the Fourth Circuit, the Eighth Circuit has held that laws restricting sex-change treatments discriminate on the basis of sex, triggering heightened scrutiny. In *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022), the Eighth Circuit affirmed a preliminary injunction prohibiting enforcement of a law banning "gender transition procedures" for minors. *Id.* at 668. The court held that the law discriminates based on sex because "medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex." *Id.* at 669. And it held that the law cannot survive intermediate scrutiny. *Id.* at 670.

By contrast, the Sixth and Eleventh Circuits have subjected such laws to rational-basis review, which both found they likely survive. In *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023), the plaintiffs argued that a Tennessee law prohibiting certain treatments and procedures for the purpose of "enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" discriminates based on sex because "a boy with abnormally low testosterone levels could receive a testosterone booster in adolescence, but a girl could not receive testosterone in transition." *Id.* at 481. The Sixth Circuit rejected that argument, reasoning that such treatments are "by biological necessity … medical procedures that only one sex can undergo," and that "laws regulating medical procedures that only one sex can undergo ordinarily do not trigger heightened constitutional scrutiny." *Id.* (citing *Dobbs*, 597 U.S. at 236, and *Geduldig*, 417 U.S. at 496 n.20). The court found the plaintiffs' contrary arguments hopelessly "flaw[ed]," explaining that using "testosterone … to treat gender dysphoria" is "a different procedure from using testosterone" to treat a different condition. *Id.* The Constitution, the court concluded, "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* at 481-82.

The Eleventh Circuit took the same approach in *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023). That case involved an Alabama law banning certain treatments "for the purpose of attempting to alter the appearance of or affirm the minor's perception of his or her gender or sex, if that appearance or perception is inconsistent with the

minor's sex." *Id.* at 1213. The court rejected the plaintiffs' argument that the law discriminates on the basis of sex and transgender status. As to sex discrimination, the court held that the law merely "establishes a rule that applies equally to both sexes: it restricts the prescription and administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for *all* minors." *Id.* (citing *Skrmetti*, 73 F.4th at 419). As to transgender discrimination, the court expressed "grave 'doubt' that transgender persons constitute a quasi-suspect class." *Id.* at 1230. But even if they did, the court concluded that "the regulation of a course of treatment that, by the nature of things, only transgender individuals would want to undergo would not trigger heightened scrutiny unless the regulation is a pretext for invidious discrimination against such individuals." *Id.* at 1230.

Proceedings remain ongoing in the Eighth and Eleventh Circuits. The Eighth Circuit granted initial en banc review in the defendants' appeal of a permanent injunction in *Brandt*, and a petition for rehearing en banc remains pending in *Eknes-Tucker*. But no matter how the courts resolve those cases, the conflict between the circuits will persist because the Fourth and Sixth Circuits have staked out diametrically different positions. If anything, the split will only deepen, as more cases wait in the wings. The Eleventh Circuit is considering an equal-protection challenge to a Florida law banning Medicaid reimbursement for "sex reassignment prescriptions or procedures." *Dekker v. Sec'y, Fla. Agency for Health Care Admin.*, No. 23-12155 (briefing completed Jan.

18, 2024). And the Seventh and Tenth Circuits are considering equal-protection challenges to state laws restricting sex-change treatments for minors. *See K.C. v. Individual Members of the Med. Licensing Bd.*, No. 23-2366 (7th Cir.) (argued Feb. 16, 2024; preliminary injunction stayed Feb. 27, 2024); *Poe v. Drummond*, No. 23-5110 (10th Cir.) (argued Jan. 17, 2024).

2. The decision below also reinforces a circuit split about whether transgender individuals are a suspect or quasi-suspect class under the Equal Protection Clause. In the decision below, the en banc Fourth Circuit doubled down on its holding in *Grimm* that transgender individuals are a quasi-suspect class for equal-protection purposes. 972 F.3d at 613. The Ninth Circuit, too, has concluded that "gender identity is at least a 'quasi-suspect class.'" *Hecox v. Little*, 104 F.4th 1061, 1079 (9th Cir. 2023); *see also Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019) (per curiam). And while the Tenth Circuit has found it unnecessary to answer that question, that is because it maintains that discriminating on the basis of transgender status "necessarily discriminates on the basis of sex as well." *Fowler v. Stitt*, 104 F.4th 770, 788 (10th Cir. 2024). In embracing that reasoning, the court agreed with the Ninth and Seventh Circuits that this Court's decision in *Bostock v. Clayton County*, 590 U.S. 644 (2020), compels that result. *See Fowler*, 104 F.4th at 788-94; *Hecox*, 104 F.4th at 1079-80; *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023).

The Sixth Circuit, by contrast, has declined to find that transgender individuals are a quasi-suspect

class. *See Skrmetti*, 83 F.4th at 486; *Gore v. Lee*, 2024 WL 3385247, at *6-7 (6th Cir. July 12, 2024). The Eleventh Circuit has expressed "grave doubt that transgender persons constitute a quasi-suspect class." *Eknes-Tucker*, 80 F.4th at 1230; *see also Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022) (en banc). And both courts have rejected the proposition that discriminating on the basis of transgender status necessarily discriminates on the basis of sex. *See Skrmetti*, 83 F.4th at 484-85; *Eknes-Tucker*, 80 F.4th at 1228-29. In so doing, the Sixth Circuit expressly rejected the argument that *Bostock* compels a different result, concluding (among other things) that its "text-driven reasoning applies only to Title VII." *Skrmetti*, 83 F.4th at 484; *see also Gore*, 2024 WL 3385247, at *5-6. The Eleventh Circuit likewise held that *Bostock* has "minimal relevance" in the equal-protection context because the "Equal Protection Clause contains none of the text that the Court interpreted in *Bostock*." *Eknes-Tucker*, 80 F.4th at 1229.

In short, the circuits are squarely divided on how the Equal Protection Clause impacts laws that restrict access to or coverage for treatments and procedures to change the physical attributes of one's biological sex, in large part because they read one of this Court's precedents differently. And the threshold question of whether such laws discriminate on a suspect basis has proven dispositive in most cases. This Court should at a minimum hold this case while it considers that question in the context of laws specific to minors. But granting this case would provide an opportunity to consider it in the equally critical context of whether States have an obligation to fund treatments and

procedures about which there remains a great deal of disagreement and uncertainty.

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

The Fourth Circuit's conclusion that a state health benefit plan's decision to exclude coverage for treatments and procedures to change one's biological sex violates the Equal Protection Clause defies this Court's precedent, longstanding tradition, and common sense. States do not discriminate against any protected class when they decline to cover certain treatments and surgeries across the board, even when those coverage decisions have a disproportionate effect on some plan participants. And the Constitution certainly does not mandate that States not only permit, but fund, these highly controversial forms of medical intervention while the ongoing medical debate remains unsettled.

A. The Coverage Exclusion Does Not Discriminate on the Basis of Sex.

1. North Carolina's exclusion of coverage for sex-change treatments does not discriminate 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 whether the patient seeks a particular type of treatment—namely, a treatment "leading to or in connection with sex changes or modifications." No patient, male or female, can receive coverage for drugs or surgical procedures "in connection with sex changes or modifications." The exclusion is thus "best understood" as a rule "that targets specific medical interventions," not "one that classifies on the basis of any suspect characteristic

under the Equal Protection Clause." *Eknes-Tucker*, 80 F.4th at 1227.

True, the exclusion uses the words "sex change." But it does so only to define the type of *treatment* excluded from coverage, not to provide "dissimilar treatment for men and women" who are "similarly situated." *Reed v. Reed*, 404 U.S. 71, 77 (1971); *see also Skrmetti*, 83 F.4th at 482. Whether the Plan covers therapy that involves testosterone, for example, does not turn on whether the patient is male or female; it turns on the nature of the therapy. The Plan covers the use of testosterone to treat primary hypogonadism (a use approved by the FDA) and metastatic mammary cancer. CA4.JA988-89. But it does not cover the use of testosterone to treat erectile dysfunction, symptoms of menopause, or to facilitate "sex changes"—uses not approved by the FDA. CA4.JA181-82. The Plan covers mastectomies and chest reconstruction surgeries to treat patients, male or female, diagnosed with breast cancer. CA4.JA587-88. And it covers vaginoplasties for patients who suffer from congenital birth defects or physical injuries to the vagina (e.g., injuries incurred during childbirth). CA4.JA591-98. But it does not cover those procedures when undertaken for cosmetic purposes, to treat a psychological or emotional condition, or to facilitate "sex changes." CA4.JA179-81.

To be sure, some of those coverages and exclusions may affect only biological men or women. Only biological men, for instance, would use testosterone to treat erectile dysfunction, and only biological women would use it to treat menopause. So too with

treatments to facilitate a sex change: A biological man might seek estrogen therapy, a penectomy, a vaginoplasty, and breast augmentation surgery to facilitate a sex change; a biological woman would not. Conversely, a biological woman might seek testosterone therapy, a mastectomy, and a phalloplasty to facilitate a sex change; a biological man would not. But this Court has long held that "official action will not be held unconstitutional solely because it results in" a "disproportionate impact" on one sex. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). Proof of "discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. And this Court has explicitly rejected the argument that discriminatory intent can be inferred from a State's refusal to cover a medical treatment that only one sex can obtain. *See Geduldig*, 417 U.S. at 496.

Geduldig involved a challenge to California's exclusion of disability-insurance coverage for "any injury or illness caused by or arising in connection with pregnancy." *Id.* at 489. The dissent argued that the exclusion discriminated on the basis of sex by "singling out for less favorable treatment a gender-linked disability peculiar to women." *Id.* at 501 (Brennan, J., dissenting). This Court disagreed. The program, it explained, "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities." *Id.* at 496 n.20. While "only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification" subject to heightened scrutiny. *Id.* "Absent a showing that

distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.*

The Court invoked the same reasoning in *Dobbs* to reject an equal-protection challenge to a law restricting abortion. The Court reiterated: "The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is 'mere pretext designed to effect an invidious discrimination against members of one sex or the other.'" 597 U.S. at 236-37 (quoting *Geduldig*, 417 U.S. at 496 n.20). Because States have many reasons to regulate abortion that have nothing to do with "'invidiously discriminatory animus' against women," the Equal Protection Clause does not subject such laws to heightened scrutiny. *Id.* (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-74 (1993)).

Those principles resolve this case. North Carolina does not deny anyone benefits because of their sex. It declines to cover drugs and surgical procedures to facilitate "sex changes" regardless of whether a biological woman or a biological man seeks them, just as it declines to cover other treatments for men and women alike. And the State has many reasons to decline coverage for such treatments that have nothing to do with animus toward either sex. Indeed, in the context of coverage decisions, as opposed to direct regulation of procedures, States will almost

always have a non-invidious reason to limit coverage—namely, to prioritize coverage for more cost-effective treatments. *See infra* Part II.C. Respondents thus can prove sex discrimination only by proving that the Plan adopted the exclusion "'because of,' not merely 'in spite of,' its adverse effects" on a particular sex. *Feeney*, 442 U.S. at 279. They have not come close to doing so. Respondents have instead insisted that the exclusion is *inherently* discriminatory—a proposition that is squarely foreclosed by *Geduldig* and *Dobbs*.

2. The Fourth Circuit nevertheless concluded that the Plan discriminates on the basis of sex, on the logic that it treats biological men and biological women differently because those "assigned female at birth can receive vaginoplasty and breast reconstruction for gender-affirming purposes, but those assigned male at birth cannot," and "those assigned male at birth can receive a mastectomy for gender-affirming purposes, but those assigned female at birth cannot." App.44. That reasoning is flawed at every turn.

First, it assumes a false equivalence between surgical procedures that are patently not the same. To take just a few examples, while the term "vaginoplasty" is often used to cover both repairing the vagina of a natal woman and constructing a vagina for a natal man, "a natal man's 'vaginoplasty' will be very different from a natal woman's." *Lange v. Houston Cnty.*, 101 F.4th 793, 802 (11th Cir. 2024) (Brasher, J., dissenting). "For a natal man to undergo a vaginoplasty, the testicles will be removed, the urethra will be shortened, and the penile and scrotal skin will be used to line the neovagina," none of which

is necessary for a natal woman. *Id.* Conversely, "the construction of a neopenis" in a natal woman is quite different from "a phalloplasty a natal man may undergo," as it "involves removal of the uterus, ovaries, and vagina, and creation of a neophallus and scrotum with scrotal prostheses," which "is a multistage reconstructive procedure." *Id.*

The same is true when it comes to drugs. To be sure, both biological men and biological women are capable of undergoing "hormone therapy." But the nature of the therapy and the risks it carries can differ dramatically. For instance, using testosterone to make a biological female appear more masculine (which is *not* an FDA-approved use) poses risks to brain development, psychosocial development, and bone density that using testosterone to treat hypogonadism in a biological male (an FDA-approved use) does not. *See Poe v. Drummond*, 697 F.Supp.3d 1238, 1262-63 (N.D. Okla. 2023). That is precisely why medical professionals consider factors like the sex, age, and physical and mental health of a person seeking medical treatment before determining whether and how to provide it: Treatment can be quite different, both in what it entails and in what risks it poses, depending on who seeks it and for what reason. Trying to slap the same label on all these disparate medical interventions defies biological and medical reality and ignores exactly the kinds of factors that benefit plans are *supposed* to consider when deciding how to allocate finite resources.

Even accepting that false equivalence, moreover, the Fourth Circuit's conception of "gender-affirming" treatment is divorced from reality. North Carolina's

Plan does not cover surgical interventions for *any* patients—male or female—who seek them for "gender-affirming purposes." App.44. As Judge Richardson explained, the Plan would not cover breast augmentation surgery for a biological female who wishes to look more feminine. App.116-17. Nor would it cover breast reduction surgery for a biological male who wants to look more masculine. App.166. The Plan covers breast alteration procedures to treat specific *medical conditions* (e.g., breast cancer or symptomatic gynecomastia), and it categorically declines coverage when they are sought only to affirm the patient's preferred gender, regardless of whether that preference aligns with or differs from the patient's biological sex.

The Fourth Circuit tried to elide that conclusion by declaring any treatment that has the effect of "better align[ing]" physical "presentation" with attributes typically associated with a particular "gender" a form of "gender-affirming" treatment. App.45-46. Setting aside the irony that that reasoning is itself "rooted in a gender stereotype," App.46, it proves far too much. By that logic, it would be sex discrimination to cover testosterone therapy for a biological female who wishes to change her sex, but not for a biological male who seeks to treat his depressive disorder by building more muscle. Every comparable coverage choice would trigger heightened scrutiny, requiring States to provide an "exceedingly persuasive justification" for all of them. *United States v. Virginia*, 518 U.S. 515, 531 (1996).

All that goes to show that the coverage exclusion does not "provide dissimilar treatment for men and

women who are similarly situated." *Frontiero v. Richardson*, 411 U.S. 677, 683 (1973). Indeed, the Fourth Circuit appeared to acknowledge 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. App.44. But it waved that problem away on the theory that "there is no threshold similarly situated inquiry in the equal-protection analysis." App.44. That is wrong. The whole point of cases like *Geduldig* is that laws that have only a disparate *impact* on one sex are not subject to heightened scrutiny when they address issues as to which men and women are not similarly situated, like "a medical procedure that only one sex can undergo." *Dobbs*, 597 U.S. at 236-37. Indeed, the case the Fourth Circuit cited for its contrary conclusion applied intermediate scrutiny only after concluding that a law treated men and women differently "under like circumstances." *Nguyen v. INS*, 533 U.S. 53, 60 (2001). But it is also beside the point, as even the Fourth Circuit acknowledged that a similarly situated analysis would have to be conducted at *some* point, App.47-48, so the obvious differences among respondents' proffered comparators should have doomed their case either way.

Rather than focus on whether the law treats the sexes differently under similar circumstances, the Fourth Circuit insisted that the exclusion *must* be discriminatory under this Court's decision in *Bostock* because it "cannot be applied 'without referencing sex.'" App.45. This Court has not extended *Bostock*'s reasoning to the Equal Protection Clause, and it is doubtful that it should or would. *See Skrmetti*, 83 F.4th at 484-85; *Eknes-Tucker*, 80 F.4th at 1229. But,

once again, the Fourth Circuit's premise is wrong. Just as a policy excluding pregnancy care can be applied without asking whether the person seeking it is a woman, a policy excluding treatments to change or modify biological sex can be applied without knowing the sex of who is seeking it. All that must be known is what treatment is sought for what diagnosis. That is true not just in theory but in practice: The Plan allows participants to select their sex and change their selection whenever they want, and the third-party administrator does not even look at the patient's sex when deciding whether to cover a treatment; it looks only at the procedure code and the diagnosis code. CA4.JA168-70, 185-87. And in many instances knowing a patient's sex will say nothing about whether a treatment is covered. For example, knowing that a patient is a woman says nothing about whether the Plan will cover her testosterone prescription or mastectomy. Likewise, knowing that a patient is a man says nothing about whether the Plan will cover his penectomy or chest reconstruction surgery. To determine whether those treatments are covered, one must know the patient's *diagnosis*.

To be sure, sometimes one can infer from the combination of the diagnosis and the treatment whether someone is a biological man or a biological woman, just as one can infer from a request to cover pregnancy care that the person seeking it is a biological woman. And the ultimate effect of the policy is to exclude coverage for some treatments that can be sought only by biological men, and others that can be sought only by biological women. 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).

The Fourth Circuit insisted that "*Geduldig* is best understood as standing for the simple proposition that pregnancy is an insufficiently close proxy for sex." App.29. That claim is nothing short of bizarre. All agreed in *Geduldig* that "only women can become pregnant," 417 U.S. at 496 n.20, making pregnancy a *perfect* proxy for sex. What the Court concluded is that pregnancy is an insufficiently close proxy for *invidious discrimination* on the basis of sex because there are "objective and wholly noninvidious" reasons to treat pregnancy differently. *Id.* at 496. Here too, there are objective reasons to decline to cover sex-change treatments that have nothing to do with invidious discrimination against men or women. Even if those treatments may bear some resemblance to treatments that are covered for one or both sexes in other contexts, medical interventions to alter the physical characteristics of someone's biological sex carry different risks and costs and remain the subject of considerable medical, psychiatric, and moral debate. *See infra* Part II.C. And while reasonable minds may disagree on who has the better of that debate, North Carolina's decision not to pay for such treatments is not "so irrational that nothing could explain it other than an intent to discriminate" on the basis of sex. App.93.

B. The Coverage Exclusion Does Not Discriminate Against Transgender Individuals.

The Fourth Circuit's conclusion that the Plan triggers heightened scrutiny because it discriminates on the basis of transgender status fares no better. The Plan does not deny coverage to transgender individuals because they are transgender. In fact, the Plan does not keep track of which patients identify as transgender. CA4.JA168-70. Transgender people can receive hormone treatment, hysterectomies, vaginoplasties, and all manner of other procedures so long as they have a qualifying diagnosis. Had respondents sought testosterone therapy to treat hypogonadism or metastatic mammary cancer, for example, the Plan would have covered the treatment even though they identify as transgender. Conversely, it would deny coverage for sex-change treatment regardless of whether the person seeking it identifies as transgender.

The Fourth Circuit appeared to recognize that the Plan distinguishes between "types of *treatments*," not on whether the person seeking them is transgender. App.23 (emphasis added). But it held that the Plan indirectly discriminates against transgender people, on the theory that treatments leading to "sex changes" are really "treatments for gender dysphoria," and gender dysphoria is a "proxy for transgender identity." App.23-24. That is a dubious premise, as "[n]ot all transgender people are diagnosed with gender dysphoria," and "not all people with gender dysphoria seek gender-affirming surgery." App.24. Moreover, as one of the State's experts testified, "there may be

people who have symptoms of gender dysphoria" who "don't identify as transgender." CA4.JA1037. But even accepting the Fourth Circuit's premise, its reasoning cannot be squared with *Geduldig* and *Dobbs*, which squarely hold that regulating procedures that only one group can undergo does not trigger heightened scrutiny absent proof of pretext.

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*, 506 U.S. at 270. "A tax on wearing yarmulkes," for example, "is a tax on Jews." *Id.* But just as there is no basis to presume that singling out pregnancy is a smokescreen for invidious discrimination against women, there is no basis to presume that excluding some (but not all) gender-dysphoria treatments is a smokescreen for punishing transgender individuals. App.93-94. As Judge Richardson explained, there are many rational reasons to decline to pay for sex-change treatments. App.93-94. And just as the "fiscal and actuarial benefits" of declining to insure pregnancy-related disabilities "accrue[d] to" both male and female plan participants in *Geduldig*, 417 U.S. at 496 n.20, the fiscal and actuarial benefits of North Carolina's decision not to cover sex-change treatments accrues to transgender and non-transgender participants alike in this case. That itself is a strong indication that invidious discrimination is not afoot.

In all events, even if the exclusion did classify based on transgender status, the Fourth Circuit was wrong to declare transgender individuals a quasi-

suspect class. App.22-23 (citing *Grimm*, 972 F.3d at 611-13). This Court has "rarely deemed a group a quasi-suspect class," *Adams*, 57 F.4th at 803 n.5, and has not done so "in over four decades," *Skrmetti*, 83 F.4th at 486. Now is not the time to reverse that trend. Issues concerning transgender status are fraught with ongoing debate. *Id.* To make the findings necessary to treat transgender status as a quasi-suspect class, this Court would need to weigh in on multiple hotly contested questions. *Id.* Those questions are best left for scientific debates and the political process. App.130-32.

C. Even if the Coverage Policy Triggers Heightened Scrutiny, a Reasonable Jury Could Determine that North Carolina Satisfies It.

The Fourth Circuit likewise erred by concluding that the State could not satisfy heightened scrutiny. Because "[p]hysical differences between men and women … are enduring," this Court has repeatedly made clear that the point of heightened scrutiny is not to "make sex a proscribed classification." *Virginia*, 518 U.S. at 533. It is to ensure that a State is not drawing sex classifications because of "outmoded notions of the relative capabilities of men and women." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985). States may legitimately account for "biological differences" between the sexes. *Nguyen*, 533 U.S. at 73. And where a sex-based classification serves "important governmental objectives" and employs means "substantially related to the achievement of those objectives," it may stand. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

North Carolina has an "exceedingly persuasive justification" for refusing to pay for these treatments. The record reflects significant uncertainty about the efficacy and cost-effectiveness of medical interventions that lead to sex changes. As one of the State's experts testified, "gender affirmation treatments remain experimental and have never been accepted by the relevant scientific community and have no known or published error rate." CA4.JA631-32. States have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). And they plainly have an important interest in declining to facilitate medical treatments with uncertain efficacy. Refusing to pay for such treatments is "substantially related" to that interest. *See Eknes-Tucker*, 80 F.4th at 1234-35 (Brasher, J., concurring).

The Fourth Circuit's reasons for concluding otherwise do not withstand scrutiny. The court determined that the State (at most) demonstrated that "gender-dysphoria treatments are … still developing," not that they are "ineffective." App.51. But the State need not conclusively prove that the treatments are ineffective to decline to cover them. It is enough to show that they are novel and "still developing" and that their efficacy is uncertain. And while the record contains evidence on both sides of the debate, intermediate scrutiny permits "the legislature [to] make a predictive judgment" based on competing evidence. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799-00 (2011).

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

As this Court recognized when it granted certiorari in *Skrmetti*, No. 23-477, the issues at stake here are exceedingly important. Moreover, while the laws at issue in *Skrmetti* are a relatively recent phenomenon, many state coverage restrictions (like this one) are longstanding. Those restrictions are also widespread. By one count, more than a dozen state Medicaid plans have such policies. *See Medicaid Coverage of Transgender-Related Health Care*, Movement Advancement Project, https://tinyurl.com/mr2prpzz (last visited July 25, 2024). More than a dozen state employee benefit plans do too. *See Healthcare Laws and Policies: State Employee Benefits*, Movement Advancement Project, https://tinyurl.com/yeynnxua (last visited July 25, 2024). And several states have laws that authorize private insurers to refuse to cover such treatments, which many do. *See Healthcare Laws and Policies: Private Insurance*, Movement Advancement Project, https://tinyurl.com/yeynnxua (last visited July 25, 2024). The Fourth Circuit's decision calls all those laws and policies into question.

This case is an excellent vehicle to resolve the question presented. The parties engaged in years of discovery and compiled an extensive factual record, and the district court issued final judgment on the equal-protection claims, granting summary judgment to respondents and issuing a permanent injunction prohibiting the State from enforcing the exclusion. The Fourth Circuit definitively resolved the equal-protection (and other) questions in an en banc opinion

that generated three dissents. And there are no obstacles that would prevent the Court from reviewing those conclusions.[6]

While the Court will consider related questions in *Skrmetti*, there are strong reasons to grant this case too. *Skrmetti* comes to this Court on a preliminary-injunction record, where the parties conducted limited discovery. This case comes to the Court on a permanent-injunction record, where the parties conducted years of discovery and deposed each other's experts. And while both cases address related issues, coverage questions raise distinct issues from laws banning procedures altogether. Laws like the one at issue in *Skrmetti* can be promulgated only by state actors exercising traditional police powers over the practice of medicine. Coverage policies can be imposed by private and public sector health plans alike. So while the law in *Skrmetti* is inherently a product of state action, the state action and applicability of the Equal Protection Clause are almost accidental when it comes to coverage decisions. Moreover, the very fact that private plans can and do make the same determination underscores that there are perfectly rational economic reasons to limit coverage.

In short, this Court would benefit from granting plenary review and hearing this case in tandem with,

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[6] While respondents' claim under §1557 of the ACA remains pending, that is no obstacle to review of the equal-protection issue. In fact, resolving the latter may well resolve the former, as both the majority and the dissenting opinions treated the ACA analysis as largely derivative of the equal-protection analysis when addressing the West Virginia plaintiffs' ACA claim. App.67-68; App.95.

or at least during the same Term as, *Skrmetti*. The cases involve different state policies, but those policies reinforce and inform each other. The fact that some of the treatments at issue are so controversial that States have acted to prevent people from obtaining them until they reach the age of majority reinforces the decision of benefit plans to withhold coverage. And the fact that States and private health benefit plans alike have long limited coverage informs whether more recent legislation reflects invidious motives. The Court would therefore benefit from considering both cases together. But one way or another, the decision below should not be the last word on whether the Constitution requires North Carolina to pay for highly controversial medical treatments and procedures.

CONCLUSION

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

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