No. 23-5110

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETER POE, *et al.*,

Plaintiffs-Appellants

v.

GENTNER DRUMMOND, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
The Honorable Judge John F. Heil, III
No. 23-cv-00177-JFH-SH

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

This case challenges an Oklahoma statute criminalizing the provision of certain medical care for transgender minors. The United States has a strong interest in protecting the rights of individuals who are lesbian, gay, bisexual, transgender, and intersex. The President issued an Executive Order recognizing the right of all people to be "treated with respect and dignity" and to receive "equal treatment" regardless of gender identity or sexual orientation. Exec. Order No. 13,988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021). In addition, 42 U.S.C. 2000h-2 authorizes the Attorney General to intervene to address sex-based denials of equal protection of the laws under the Fourteenth Amendment.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States addresses the following question:

Whether Oklahoma Senate Bill 613, which criminalizes the provision of certain kinds of medical care for transgender minors but not for other minors, is a classification based on sex and transgender status that is subject to and fails heightened equal-protection scrutiny.

STATEMENT OF THE CASE

A. Senate Bill 613

Oklahoma enacted Senate Bill 613 (SB613) on May 1, 2023. Okla. Stat. tit. 63, § 2607.1 (2023). The law makes it a felony for a healthcare provider to "knowingly provide gender transition procedures to any child." *Id.* § 2607.1(B) and (D). SB613 defines "[g]ender transition procedures" as "medical or surgical services performed for the purpose of attempting to affirm the minor's perception of his or her gender or biological sex, if that perception is inconsistent with the minor's biological sex." *Id.* § 2607.1(A)(2)(a). Prohibited procedures include "surgical procedures that alter or remove physical or anatomical characteristics or features that are typical for the individual's biological sex" and "puberty-blocking drugs, cross-sex hormones, or other drugs to suppress or delay normal puberty or to promote the development of feminizing or masculinizing features consistent with the opposite biological sex." *Id.* § 2607.1(A)(2)(a)(1) and (2).

SB613 expressly exempts medical treatment for, among other things, "medications prescribed, dispensed, or administered specifically for the purpose of treating precocious puberty or delayed puberty," and "services provided to individuals born with ambiguous genitalia, incomplete genitalia, or both male and female anatomy, or biochemically verifiable disorder[s] of sex development." Okla. Stat. tit. 63, § 2607.1(A)(2)(b)(3) and (4). A minor already receiving

puberty-blocking drugs or hormone therapy at the time of the law's effective date may continue to receive it for six months solely for the purpose of "gradually decreasing and discontinuing" its use. *Id.* § 2607.1(A)(2)(b)(7).

Physicians or medical practitioners who violate SB613 are "guilty of a felony," along with being subject to discipline for "unprofessional conduct" by their regulating licensing boards. Okla. Stat. tit. 63, § 2607.1(C) and (D). The statute also allows for Oklahoma Attorney General and private enforcement of its provisions. *Id.* § 2607.1(E) and (F).

SB613 was enacted as part of a series of bills targeting transgender individuals in Oklahoma. J.A.(Vol.I).0064.[1] In advocating for SB613's passage, one Oklahoma lawmaker stated that being transgender was a path toward "desolation, destruction, degeneracy, and delusion, ending in delusional play acting."[2] A co-author of the bill referred to gender-affirming care as

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[1] "J.A.(Vol.__).____" refers to the joint appendix by volume and page number.

[2] Statement of Representative Jim Olsen, House First Regular Floor Session, Day 47 Afternoon Session, Apr. 26, 2023, 6:03:20-6:03:38 PM, *available at* https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20230525/-1/53682.

"misinformation" and "a lie."[3] Another referred to a transgender couple as "pretending."[4] *See generally* J.A.(Vol.I).0064-0065.

B. Procedural History

Five transgender minors who currently receive medical treatments banned by SB613, along with their parents, legal guardians, and one healthcare provider, filed a complaint seeking declaratory and injunctive relief against Oklahoma government officials, including members of the Oklahoma State Board of Medical Licensure and Supervision and the Attorney General of Oklahoma. J.A.(Vol.I).0035-0037. Plaintiffs allege, as relevant here, that SB613 violates their rights under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 0081-0086.

Plaintiffs moved for a preliminary injunction barring enforcement of SB613 the day after its enactment. J.A.(Vol.I).0115-0117. Though the law went into effect immediately upon enactment, the parties agreed on May 18, 2023, that defendants would not enforce it until the district court ruled on plaintiffs' motion

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[3] Statement of Senator Shane Jett, Legislative Session in the Senate Chamber, Feb. 15, 2023, 10:23:28-10:23:40 AM, *available at* https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20230525/-1/53682.

[4] Statement of Senator Scott Fetgatter, Legislative Session in the Senate Chamber, Apr. 26, 2023, 6:15:20-6:15:52 PM, *available at* https://sg001-harmony.sliq.net/00283/Harmony/en/PowerBrowser/PowerBrowserV2/20230426/-1/53682.

for a preliminary injunction. J.A.(Vol.II).0418-0420. The United States filed a Statement of Interest supporting plaintiffs' equal protection claim. J.A.(Vol.III).0422-0451. The district court denied plaintiffs' motion on October 5, 2023 (corrected on October 6, 2023). J.A.(Vol.VI).1230-1301.

1. The district court first rejected plaintiffs' claim that SB613 discriminates based on sex. J.A.(Vol.VI).1276-1279. The court dismissed the argument that SB613 is a sex classification because it makes distinctions using gendered terminology, asserting that "[t]he use of these 'gendered terms' reflects the nature of the procedure being regulated, not an intention to discriminate between people of different sexes." *Id.* at 1276 (quoting J.A.(Vol.I).0137 and citing *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1228 (11th Cir. 2023), *pet. for reh'g en banc pending* (filed Sept. 11, 2023), and *L.W. v. Skrmetti*, 83 F.4th 460, 482 (6th Cir. 2023), *pets. for cert. pending*, Nos. 23-466 (filed Nov. 1, 2023), 23-477 (filed Nov. 6, 2023), and 23-492 (filed Nov. 9, 2023)). Rather, the court reasoned, "*all* minors, regardless of sex, are prohibited from undergoing certain procedures for the purpose of gender transition before reaching the age of majority." *Id.* at 1277.

The district court also found unpersuasive plaintiffs' argument, based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that SB613 discriminates based on sex because it "enforces sex stereotypes and gender conformity." J.A.(Vol.VI).1277 (quoting J.A.(Vol.I).0138). "Absent binding precedent to the

contrary," the court declined to extend *Bostock* to the equal protection context. *Id.* at 1278. The court further stated that even if it were to hold that classifications based on gender nonconformity were sex-based classifications under the Equal Protection Clause, "[t]his is not a case where a state action is being taken to further a particular gender stereotype or prohibit conduct that contravenes that stereotype." *Id.* at 1279.

The district court similarly rejected plaintiffs' argument that SB613 warrants heightened scrutiny because it discriminates based on transgender status. J.A.(Vol.VI).1279. The court remarked that the Supreme Court has not recognized transgender individuals as a suspect class, and it was not persuaded that SB613 was part of a larger legislative strategy by Oklahoma to discriminate against transgender people. *Id.* at 1279-1280. Nor was the court swayed by the argument that SB613 discriminates against transgender people because it bans medical care that only transgender people need or seek. The court asserted that "that fact alone does not render the statute invalid," absent evidence that the ban was a mere pretext for invidious discrimination against members of one sex. *Id.* at 1281 (citing *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-2246 (2022)). For these reasons, the court held that "the legislature's classification scheme will be upheld so long as it survives rational basis review." *Id.* at 1282.

2. Applying rational-basis scrutiny, the district court rejected plaintiffs' equal protection claim. The court concluded that there was "no consensus in the medical field about the extent of the risks or the benefits of" the gender-affirming care procedures at issue and opined that the "[c]ourt should not cut off this debate by declaring that only one side has all the answers." J.A.(Vol.VI).1291. The court asserted that it was "rational for the Oklahoma Legislature to regulate the [treatments] for minors while the democratic process resolves ongoing questions of safety and efficacy." *Id.* at 1293. Finally, the court contended that the differential treatment between transgender minors and minors with precocious puberty or variations in sexual development (which the court called "disorders of sexual development") was justified based on alleged differences between diagnoses, risks, length of use, and intent. *Id.* at 1294-1299.

3. Accordingly, the district court concluded that plaintiffs failed to establish a likelihood of success on their equal protection claim. J.A.(Vol.VI).1300-1301.

Plaintiffs timely appealed. J.A.(Vol.VI).1302.

SUMMARY OF ARGUMENT

The district court erred in holding that plaintiffs were unlikely to succeed on the merits of their equal-protection claim. SB613's ban on the use of puberty blockers and hormone therapies for gender-affirming care is subject to, and cannot survive, intermediate scrutiny.

SB613 is subject to heightened scrutiny because it classifies based on sex and transgender status. First, SB613 facially discriminates based on sex by using explicitly sex-based terminology to delineate which minors may or may not receive puberty blockers or hormones. Second, it discriminates based on sex by targeting transgender minors, which is a form of sex discrimination. Third, SB613 discriminates based on sex because it punishes transgender minors based on their gender nonconformity by prohibiting them from obtaining treatments that would change their appearance in a way that is not "typical for" or "consistent with" their sex assigned at birth. Finally, heightened scrutiny applies for the independent reason that SB613 discriminates against transgender individuals, who constitute at least a quasi-suspect class.

SB613 cannot survive heightened scrutiny. Though the defendants assert that SB613 serves their interest in protecting the health and safety of minors, banning the use of puberty blockers and hormones to treat gender dysphoria, as SB613 does, does not serve that interest because it is well-established that such treatments are medically necessary and helpful—not harmful—for transgender youth. Every major American medical association endorses such care to treat gender dysphoria. Moreover, the statute is underinclusive because it expressly permits non-transgender minors to access the very same treatments that it denies to transgender minors. It is also overinclusive because SB613 categorically bans

necessary medical care to transgender minors when more tailored regulation could address Oklahoma's asserted concerns regarding these treatments.

ARGUMENT

Plaintiffs are likely to succeed on the merits of their equal protection claim.

In considering a preliminary injunction, a movant must show, among other things, "a likelihood of success on the merits." *Verlo v. Martinez*, 820 F.3d 1113, 1126 (10th Cir. 2016) (citation omitted). This Court should join the Eighth Circuit in holding that gender-affirming-care bans like SB613 likely violate the Equal Protection Clause. *See Brandt v. Rutledge*, 47 F.4th 661, 670-671 (8th Cir. 2022).[5]

A. SB613 warrants heightened scrutiny.

The district court erred in holding that SB613 is entitled to only rational-basis scrutiny. The statute warrants heightened scrutiny as a sex-based classification because it regulates certain medical procedures in expressly sex-based terms, discriminates based on sex by targeting transgender minors for differential treatment, and punishes transgender minors based on their gender nonconformity. In addition, SB613 discriminates based on transgender status,

[5] The Sixth and Eleventh Circuits recently held at the preliminary injunction stage that rational-basis review applied to similar gender-affirming-care bans in Kentucky, Tennessee, and Alabama, and that the bans likely survived that minimal level of scrutiny. *See Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1227-1231 (11th Cir. 2023); *L.W. v. Skrmetti*, 83 F.4th 460, 486-489 (6th Cir. 2023). For the reasons set forth below, *Skrmetti* and *Eknes-Tucker* are unpersuasive, and this Court should decline to follow them.

which is an independent basis for applying heightened scrutiny because transgender persons are at least a quasi-suspect class.

1. SB613 facially discriminates based on sex.

Because SB613 classifies based on sex, it is subject to intermediate scrutiny. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) (*VMI*). The district court erred in finding that SB613 does not classify based on sex and therefore is subject only to rational-basis scrutiny.

a. Under SB613, a "minor's sex at birth determines whether or not the minor can receive certain types of medical care" and thus necessarily "discriminates on the basis of sex." *Brandt*, 47 F.4th at 669. SB613 prohibits medical treatments "for the purpose of attempting to affirm that minor's perception of his or her gender or *biological sex*, if that perception is inconsistent with the minor's *biological sex*." Okla. Stat. tit. 63, § 2607.1(A)(2)(a) (2023) (emphasis added). Banned procedures include "surgical procedures that alter or remove physical or anatomical characteristics or features that are *typical for the individual's biological sex*" and "drugs to suppress or delay normal puberty to promote the development of feminizing or masculinizing features consistent with the *opposite biological sex*." *Ibid.* (emphases added).[6] For example, a minor

[6] Though SB613's ban on gender-affirming surgery is relevant to whether the statute discriminates based on sex, the United States takes no position in this

assigned female at birth cannot receive testosterone to acquire physical traits traditionally associated with males, but a minor assigned male at birth can. *Compare, e.g.*, Okla. Stat. tit. 63, § 2607.1(A)(2)(a)(2) *with id.* § 2607.1(A)(2)(b)(3).

In crafting SB613, the legislature could not "writ[e] out instructions" to identify the banned medical procedures "without using the words man, woman, or sex (or some synonym)." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746 (2020). Thus, because SB613 "cannot be stated without referencing sex," it is "inherently based upon a sex-classification." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1037, 1051 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018); *accord A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023), *pet. for cert. pending*, No. 23-392 (filed Oct. 11, 2023); *Brandt*, 47 F.4th at 669-670; *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021).

The district court discounted the importance of SB613's use of sex-based terminology on the ground that "[w]here the [statute] uses gendered terms, it does so" not to "distinguish between groups of people," but rather "to identify the procedures at issue." J.A.(Vol.VI).1276. But this framing analyzes the statute at

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brief on whether a ban on surgical services for transgender minors violates the Equal Protection Clause. This brief focuses only on the prohibition of puberty blockers and hormone therapies.

the wrong level of abstraction and bakes into the equal-protection analysis the very classification being scrutinized. Puberty blockers, estrogen, or testosterone can be prescribed to any minor. But under SB613, whether a minor is permitted to receive them in Oklahoma depends solely on their sex assigned at birth. Okla. Stat. tit. 63, § 2607.1(A)(2)(a). That is a facial sex classification.

b. The district court further held that SB613 is not a sex-based classification because "*all* minors, regardless of sex, are prohibited from undergoing certain procedures for the purpose of gender transition before reaching the age of majority." J.A.(Vol.VI).1277 (citing Okla. Stat. tit. 63, § 2607.1(B); *Eknes-Tucker*, 80 F.4th at 1228). But as the Supreme Court repeatedly has held, laws that restrict conduct based on a protected characteristic such as race or sex are not insulated from heightened review simply because they apply to members of all races or sexes. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-142 (1994); *Loving v. Virginia*, 388 U.S. 1, 8 (1967). Because whether a particular medical treatment is permitted or prohibited for a given minor depends on the minor's sex assigned at birth, the Oklahoma law by definition includes a sex classification. *See Bostock*, 140 S. Ct. at 1742-1743 (A law that discriminates against both transgender males and females "doubles rather than eliminates" liability for sex discrimination.).

2. SB613 discriminates based on sex by targeting transgender minors.

a. Heightened scrutiny also applies because SB613 differentiates based on transgender status, which the Supreme Court has recognized as a form of sex discrimination. In *Bostock*, the Court explained that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." 140 S. Ct. at 1741. This is because when a law "penalizes a person identified as male at birth for traits or actions that it tolerates in [a person] identified as [female] at birth," the person's "sex plays an unmistakable" role. *Id.* at 1741-1742. The very purpose of SB613 is to prohibit medical treatments provided for "the purpose of attempting to affirm the minor's perception of his or her gender or biological sex, if that perception is inconsistent with the minor's biological sex." Okla. Stat. tit. 63, § 2607.1(A)(2)(a). Indeed, the statute expressly prohibits "gender[-]*transition* procedures." *Id.* § 2607.1(B) (emphasis added). By targeting transgender minors, SB613 "unavoidably discriminates against persons with one sex identified at birth," but who identify with a different sex "today." *Bostock*, 140 S. Ct. at 1746.

b. The district court declined to apply *Bostock*'s reasoning to this case, asserting that *Bostock* involved "a materially different governing law, materially different language, and materially different facts." J.A.(Vol.VI).1278. But the court failed to explain why or how any difference in language between Title VII

and the Equal Protection Clause would render a classification sex-based under the former but sex-neutral under the latter. *Bostock*'s core insight—that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex," rings just as true in the equal-protection context. 140 S. Ct. at 1741.

c. The district court also rejected plaintiffs' argument that SB613 discriminates against transgender individuals because it bans care for a purpose for which only transgender individuals would seek it. J.A.(Vol.VI).1281. The court acknowledged that "the statute does restrict a specific course of treatment that only transgender individuals would normally request" but held that "that fact alone does not render the statute invalid." *Ibid.* Relying on *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the court concluded that "[w]here, as here, there is no evidence of pretext for discrimination, SB613's classification scheme does not trigger a heightened standard of review." J.A.(Vol.VI).1281. In *Dobbs*, the Supreme Court held that although abortion is a "medical procedure that only one sex can undergo," that fact alone was insufficient to "trigger heightened constitutional scrutiny." 142 S. Ct. at 2245-2246 (citing *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974)).

Contrary to the district court's conclusion, *Dobbs* is not instructive here. First, unlike the abortion regulation in *Dobbs* or the law excluding certain

pregnancy-related disabilities from insurance coverage in *Geduldig*, SB613 facially discriminates based on sex. *See* pp. 10-12, *supra*. Second, neither *Dobbs* nor *Geduldig* involved a law that, like SB613, generally allows certain medical procedures but bans them *only* for a discrete class of people. The law at issue in *Dobbs* banned abortion for everyone. 142 S. Ct. at 2245-2246. In contrast, SB613 regulates medical procedures that *all* individuals can undergo, but it bans them *only* when sought for the purposes for which transgender adolescents need them. To the extent defendants argue that the different purposes for which the procedures are sought justify their differential legislative treatment, that argument "conflates the classifications drawn by the law with the state's justification for it." *Brandt*, 47 F.4th at 670.

3. SB613 constitutes sex discrimination because it treats transgender minors differently based on their gender nonconformity.

The Supreme Court has recognized differential treatment based on gender nonconformity as a form of sex classification subject to heightened scrutiny. *J.E.B.*, 511 U.S. at 137-138. Multiple courts have applied heightened scrutiny to laws targeting transgender individuals because such laws punish such individuals for "fail[ing] to conform to the sex-based stereotypes associated with their assigned sex at birth." *Whitaker*, 858 F.3d at 1051; *see also Grimm*, 972 F.3d at 608-609 (collecting cases).

Discrimination based on gender nonconformity appears in SB613's plain text. SB613's prohibitions turn on whether the medical care is sought "for the purpose of attempting to affirm the minor's perception of his or her gender or biological sex, if that perception is *inconsistent* with the minor's biological sex," including those medical treatments that would "alter or remove physical or anatomical characteristics or features that are *typical* for the individual's biological sex" or would "promote the development of feminizing or masculinizing features *consistent with* the opposite biological sex." Okla. Stat. tit. 63, § 2607.1(A)(2)(a) (emphasis added). In other words, the statute's very purpose is to deny medical treatments to transgender minors when such medical treatments would cause their bodies to be out of conformance with their sex assigned at birth. In contrast, the law allows the very same treatments for minors for the purpose of *conforming* their bodies to their birth-assigned sex. For example, a minor assigned male at birth can receive testosterone to treat low hormone production because the treatment would cause his physical appearance to conform with the sex he was assigned at birth. Okla. Stat. tit. 63, § 2607.1(A)(2)(a); *id.* § 2607.1(A)(2)(b)(3) (allowing medications to treat delayed puberty).

The district court rejected plaintiffs' gender-conformity argument, remarkably contending "[t]his is not a case where a state action is being taken to further a particular gender stereotype or prohibit conduct that contravenes that

stereotype." J.A.(Vol.VI).1279. But as set forth above, forcing minors to conform to their sex assigned at birth is SB613's *raison d'être*.

4. SB613 triggers heightened scrutiny because transgender persons constitute at least a quasi-suspect class.

a. Heightened scrutiny also applies to SB613 because transgender persons constitute at least a quasi-suspect class. The Supreme Court has analyzed four factors to determine whether a group constitutes a "suspect" or "quasi-suspect" class: (1) whether the class historically has faced discrimination, *see Lyng v. Castillo*, 477 U.S. 635, 638 (1986); (2) whether the class has a defining characteristic that "frequently bears no relation to [the] ability to perform or contribute to society," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-441 (1985) (citation omitted); (3) whether members of the class have "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638; and (4) whether the class lacks political power, *see Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). If these factors are satisfied, then the classification warrants heightened scrutiny.

This test sets a high bar to ensure that a class of people truly requires "extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Several circuit courts have found that transgender persons are the rare group that meets this high bar. *See Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023), *pet. for reh'g en banc pending*

(filed Aug. 31, 2023) (citing *Karnoski v. Trump*, 926 F.3d 1180, 1200-1201 (9th Cir. 2019)); *Grimm*, 972 F.3d at 610 (collecting district court cases); *see also Brandt*, 47 F.4th at 670 n.4 (finding "no clear error in the district court's factual findings underlying [its] legal conclusion" that transgender people constitute a quasi-suspect class, but applying heightened scrutiny on a sex-discrimination theory).

Transgender individuals satisfy each of those requirements. First, "[t]here is no doubt" that transgender persons, as a class, "historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm*, 972 F.3d at 611 (citation omitted); *see also Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.").

Second, whether a person is transgender plainly bears no relation to their ability to contribute to society. As the Fourth Circuit observed, "[s]eventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational abilities.'" *Grimm*, 972 F.3d at 612 (citation omitted).

Third, there is no reasonable dispute that transgender persons share "obvious, immutable, or distinguishing characteristics that define them as a

discrete group." *Bowen*, 483 U.S. at 602 (citation omitted). Specifically, their gender identities do not align with their respective sexes assigned at birth. Courts also have recognized that "being transgender is not a choice," but rather is as "immutable as being cisgender." *Grimm*, 972 F.3d at 612-613. The testimony of plaintiffs' experts confirms this as well. *See, e.g.*, J.A.(Vol.II).0179, 0218.

Finally, transgender individuals have not "yet been able to meaningfully vindicate their rights through the political process" in much of the nation. *Grimm*, 972 F.3d at 613. They are "underrepresented in every branch of government." *Ibid.* (citing relevant data). Furthermore, the proliferation of laws and policies, like SB613, targeting transgender persons for discrimination is more evidence that transgender people lack the power necessary to protect themselves in the political process. In 2023 alone, States have enacted 85 laws that curtail or prohibit transgender people's access to health care, educational opportunities, restrooms and other public facilities, and accurate legal identification ("anti-transgender laws"). *See* 2023 Anti-Trans Bills Tracker, TransLegislation.com, https://perma.cc/KLG7-WE7D (last visited November 15, 2023). This is *more than three times* the number of such laws enacted in 2022, suggesting that anti-transgender political mobilization is *growing* rather than decreasing. *See* https://perma.cc/XU69-WFUZ (last visited November 15, 2023) (26 anti-transgender laws enacted in 2022).

b. The district court rejected plaintiffs' argument that transgender individuals constitute a quasi-suspect class without analyzing the four factors above. Rather the court remarked that "the Supreme Court has not recognized transgender status as a suspect class," and cited to an unpublished opinion for the assertion that this Court "has analyzed such claims under the rational basis standard." J.A.(Vol.VI).1279-1280 (quoting *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015)). But as the district court implicitly acknowledged, whether transgender individuals constitute a quasi-suspect class is an open question in this Circuit. *Druley* relied on this Court's opinions in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), and *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995). 601 F. App'x at 636-637. Neither case binds this Court on the issue of whether transgender individuals constitute a quasi-suspect class.

In *Etsitty*, the Court explained that the transgender plaintiff's equal-protection claim "fail[ed] for the same reasons" as her Title VII claim. 502 F.3d at 1227-1228. But the Supreme Court's *Bostock* decision squarely overruled *Etsitty*'s Title VII ruling. *See Tudor v. Southeastern Okla. State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021) ("*Etsitty* is no longer valid precedent to the extent that it conflicts with *Bostock*.").

In *Brown*, the Court affirmed a district court's dismissal of an equal-protection claim challenging a prison's refusal to provide hormone therapy to a

transgender incarcerated person. 63 F.3d at 969, 972. In discussing the applicable level of scrutiny, this Court noted that the Ninth Circuit had held at that time that transgender people are not a protected class based in part on the conclusion that gender identity is not an "immutable characteristic." *Id.* at 971 (quoting *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977), recognized as overruled in *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000)). But even two decades ago, the Court observed that "research concluding that sexual identity may be biological" called into question the Ninth Circuit's reasoning. *Ibid.*[7] Nevertheless, this Court refused to break new ground "*in* [*that*] *case*" by applying heightened scrutiny because the plaintiff's "allegations [were] too conclusory to allow proper analysis of [that] legal question." *Ibid.* (emphasis added). Thus, *Brown* specifically refused to engage in the legal analysis underlying the level-of-scrutiny debate, leaving that "legal question" open within the circuit. *Ibid.*

This Court should follow the lead of the Fourth and Ninth Circuits and find that transgender individuals constitute a quasi-suspect class entitled to heightened scrutiny.

[7] As stated above, the Ninth Circuit has since recognized transgender individuals as a quasi-suspect class. See *Hecox*, 79 F.4th at 1026 (citing *Karnoski*, 926 F.3d at 1200-1201).

5. Heightened scrutiny is consistent with the proper role of courts applying the Equal Protection Clause.

The district court asserted that "[w]here, as here, there is robust scientific and political debate concerning a significant public-policy question, a court should be loath to step in to end the debate." J.A.(Vol.VI).1291. It is true that in most contexts, the Constitution presumes "that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne*, 473 U.S. at 440. But the Equal Protection Clause's premise is that courts should take a different approach when a law or policy draws lines based on race, gender, or other suspect classifications. As our Nation's history makes clear, such distinctions are both pernicious and "unlikely to be soon rectified by legislative means." *Ibid.* When States draw distinctions based on suspect classifications, the Constitution gives courts not just the power but the duty to carefully scrutinize their proffered justifications.

B. SB613 is unlikely to survive heightened scrutiny.

Because it concluded that rational-basis review applies, the district court did not address whether SB613 could survive heightened scrutiny. In their briefing below, defendants asserted an interest in "protecting the health of minors and ensuring that they are mature before making life-altering decisions." J.A.(Vol.III).0534.

To satisfy heightened scrutiny, defendants bear the "demanding" burden of showing that "the [challenged] classification serves important governmental objectives" and that it is "substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 524 (citation omitted). This justification must be "exceedingly persuasive." *Id.* at 531 (citation omitted). As such, it "must be genuine, not hypothesized or invented *post hoc* in response to litigation" and "must not rely on overbroad generalizations." *Id.* at 533. "[A] desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

SB613's ban on medically necessary gender-affirming care for transgender youth cannot survive intermediate scrutiny for at least two reasons. First, the district court's conclusion that "there is no consensus in the medical field about the extent of the risks or the benefits of" the banned gender-affirming care was clearly erroneous. J.A.(Vol.VI).1291. Second, even assuming that defendants' asserted interest in protecting the health and safety of transgender youth was genuine, SB613 is not "substantially related" to achieving those interests. *See VMI*, 518 U.S. at 533 (citation omitted). On the contrary, banning gender-affirming care for transgender minors in Oklahoma will have devastating effects on those young people while providing no countervailing benefit to them or anyone else.

1. A strong medical consensus supports the use of puberty blockers and hormone therapies to treat gender dysphoria.

The district court asserted that "there is no consensus in the medical field about the extent of the risks or the benefits of [the prohibited gender-affirming care]." J.A.(Vol.VI).1291. That conclusion finds no support in the record. Every major American medical association, including the American Medical Association, the American Academy of Pediatrics, the American Psychiatric Association, and the Endocrine Society, has recognized that treating gender dysphoria using puberty blockers and hormone therapies is safe, effective, and medically necessary treatment for the health and well-being of some youth diagnosed with gender dysphoria. *See* J.A.(Vol.II).0178, 0184-0187, 0219-0221, 0228-0229, 0257, 0367-0368. Decades of peer-reviewed research supports the safety and efficacy of these treatments. *Id.* at 0189-0190, 0228-0229, 0257-0261, 0270, 0366-0367.

The prevailing standard of care for treating transgender youth is set out in evidence-based guidelines published by well-established medical organizations, including the World Professional Association for Transgender Health (WPATH) and the Endocrine Society. J.A.(Vol.II).0184-0189. Those guidelines endorse the use of puberty blockers and hormone therapies to treat gender dysphoria only after the onset of puberty and subject to rigorous conditions. *Ibid.* All of the Nation's major medical and mental health organizations recognize these guidelines as

reflecting the consensus of the medical community on the appropriate treatment for gender dysphoria. *See* J.A.(Vol.II).0367-0368.

In contrast to SB613's mandate, the medical-community consensus is that forcing a person with gender dysphoria to live in conformance with their sex assigned at birth is not only ineffective but can be severely harmful. J.A.(Vol.II).0178, 0261-0262. Minors with gender dysphoria who do not receive gender-affirming care face increased rates of victimization, substance abuse, depression, anxiety, and suicidality. *Id.* at 0183, 0191, 0229, 0270, 0363.

The district court's assertion that "the experimental phase" for such treatments "has truly not yet begun" is also inaccurate. J.A.(Vol.VI).1291. Puberty blockers have been used in the United States to treat gender dysphoria for nearly 20 years and to treat precocious puberty for more than 40 years, providing four decades "of data on the impact of pubertal suppression treatment on children." J.A.(Vol.II).0228.

2. SB613 is not substantially related to achieving Oklahoma's asserted interests.

Even if defendants had substantiated their asserted concerns for the health and safety of transgender minors, SB613 is not "substantially related" to addressing those concerns. *VMI*, 518 U.S. at 533 (citation omitted). The law is both underinclusive in banning the use of puberty blockers and hormone therapies for transgender minors while allowing non-transgender minors to access the very

same treatments, and overinclusive in categorically banning and criminalizing such treatments for transgender minors when more tailored approaches are available.

a. SB613 is underinclusive.

SB613 is underinclusive in addressing defendants' asserted concerns about the use of puberty blockers and hormone therapies for gender-affirming care. Indeed, the statute expressly permits the same procedures to treat a range of conditions other than gender dysphoria, including precocious or delayed puberty, intersex traits, or variations in sexual development. Okla. Stat. tit. 63, § 2607.1(A)(2)(b)(3) and (4). That is, SB613 bans critical medical care *only* for minors who need it to treat their gender dysphoria—*i.e.*, transgender minors—and not for anyone else.

The district court on four grounds justified the differential treatment between transgender minors and non-transgender minors with precocious puberty and variations in sexual development. J.A.(Vol.VI).1294-1299. First, the court reasoned that providing the treatments for gender-transition purposes is different from providing them for other purposes because, per the court, gender dysphoria is a psychological rather than a physiological condition. *Id.* at 1294-1295. Even if this were true (and the court cites no authority for this point), it is unclear why such a distinction should matter. As the Supreme Court has recognized, "[t]he mental health of our citizenry, no less than its physical health, is a public good of

transcendent importance." *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996). And in any case, the physical consequences of gender dysphoria, including increased risks of self-harm and suicidality, are well-documented in the record. *See, e.g.*, J.A.(Vol.II).0192, 0219, 0229, 0235.

Equally unfounded is the district court's assertion that treatment for gender dysphoria "push[es] the body out of alignment with the natural developmental process," while treatment for precocious puberty "allow[s] the patient's body to go through puberty at the appropriate time, rather than at an unhealthy time." J.A.(Vol.VI).1299. But adolescents begin puberty at a range of ages, and the standard of care for gender dysphoria is to initiate puberty "within the typical age range," so that "transgender adolescents with gender dysphoria who are treated with puberty delaying treatment still undergo hormonal puberty . . . alongside their peers." J.A.(Vol.II).0227-0228. And forcing transgender minors to undergo puberty at a time that contravenes the medically recommended timeline for treating gender dysphoria may have devastating consequences for their health and overall functioning, including anxiety, depression, and suicidality. *See, e.g.*, *id.* at 0258-0260.

The district court also remarked that minors who seek care for gender dysphoria "face risks that are different and more extensive than those for minors who would use the same protocols for other diagnoses" and that the long-term use

of such treatments for gender dysphoria carries greater risk than the shorter-term use of puberty blockers and hormones for precocious puberty. J.A.(Vol.VI).1296-1297. These conclusions contradict the record testimony of physicians who treat minors with gender dysphoria.

For example, one of plaintiffs' experts explained that "[t]he risks related to hormone therapy and puberty suppression generally do not vary based on the condition they are being prescribed to treat, and the same hormones are used for a variety of indications in addition to gender dysphoria." J.A.(Vol.II).0231. The expert also explained that "for youth with gender dysphoria (as compared to those treated for precocious puberty), puberty is delayed for a much shorter period of time." *Id.* at 0228. Under a proper intermediate-scrutiny analysis, Oklahoma would need to show that its asserted concerns were supported by evidence. *See Grimm*, 972 F.3d at 614 (rejecting school board's purported privacy concerns about transgender boy's use of boys' restroom because school board had failed to produce any evidence that transgender students were more likely than other students to invade the privacy of others).

To the extent defendants are concerned about fertility (J.A.(Vol.VI).1298), plaintiffs' experts have explained that "puberty blockers do not . . . permanently impair fertility." J.A.(Vol.II).0376. While gender-affirming hormones "may impair fertility, this is not universal and may also be reversible," and many

transgender people produce eggs or sperm both during and after such treatments. *Id.* at 0377. The current WPATH guidelines recommend "offering individuals considering gender-affirming medical care methods to potentially preserve their fertility." *Ibid.*; *see also id.* at 0187. And in any case, gender dysphoria is certainly not the only condition for which treatments may impair a minor's future fertility (*id.* at 0376-0378), yet Oklahoma has not taken similar steps to ban those treatments in other contexts. *See id.* at 0268-0269 (expert testimony cautioning that "[a]ll treatments in medicine carry risks, benefits, and side effects" and that "[i]t is essential that parents, adolescents, and their doctors be able to work together to weigh those factors and choose a path forward that is *most likely* to improve a young person's health, including their mental health").

b. SB613 is overinclusive.

SB613 is overinclusive because defendants could have addressed their purported concerns about puberty blockers and hormone therapies through more tailored regulation. Because SB613 categorically bans and criminalizes the provision of all hormone treatments and puberty blockers provided to treat gender dysphoria for all transgender minors under all circumstances, the statute "classif[ies] unnecessarily and overbroadly." *Sessions v. Morales-Santana*, 582 U.S. 47, 63 n.13 (2017).

Defendants asserted below that some European countries have begun to limit the use of puberty blockers and hormone therapies to treat gender dysphoria. J.A.(Vol.III).0520-0522. But *none* of these countries has imposed a complete ban on or criminalized such treatments like SB613 does. *Ibid.*; *see also* J.A.(Vol.II).0383. In fact, the recommendations for treatment by one medical body in a country that defendants highlighted "closely mirror the standards of care laid out by [WPATH] and the Endocrine Society." *Brandt*, 47 F.4th at 671.

When a State regulates based on sex, it cannot rely on such sweeping and overinclusive measures if "more accurate and impartial lines can be drawn." *Morales-Santana*, 582 U.S. at 63 n.13. For example, a more tailored approach to address defendants' purported concerns would be to codify the standard of care developed by WPATH and the Endocrine Society.

* * *

In sum, if SB613's objective is to curb asserted risks associated with puberty blockers and hormone therapies, its ban on treatments for gender dysphoria is a severely underinclusive and overinclusive response to that concern. It cannot survive heightened scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order denying a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B). The brief was prepared using Microsoft Word for Microsoft 365 and contains 6,448 words of proportionally spaced text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The typeface is 14-point Times New Roman font.

s/ Elizabeth Parr Hecker
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Date: November 16, 2023

CERTIFICATE OF DIGITAL SUBMISSION

I certify that the electronic version of the foregoing BRIEF FOR UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL, prepared for submission via ECF, complies with the following requirements:

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s/ Elizabeth Parr Hecker
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Dated: November 16, 2023