No. 23-5110

**UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

PETER POE, ET AL.,
*Plaintiffs-Appellants*,

v.

GENTNER DRUMMOND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, ET AL.,
*Defendants-Appellees*.

On Appeal from the U.S. District Court for the Northern District of Oklahoma
No. 23-cv-177-JFH-SH,
The Honorable John F. Heil III, Judge

# BRIEF OF AMICI CURIAE STATE OF CALIFORNIA AND 20 OTHER STATES SUPPORTING PLAINTIFFS-APPELLANTS AND REVERSAL

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## INTERESTS OF AMICI CURIAE

Amici Curiae States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia strongly support transgender people's right to live with dignity, be free from discrimination, and have equal access to healthcare.[1] Discrimination and exclusion on the basis of transgender status cause direct economic, physical, and emotional harms to transgender people, including an increased risk of depression, anxiety, substance abuse, and suicide. To prevent these injuries, amici States have adopted laws and policies to combat discrimination against transgender people who seek gender-affirming medical care. These laws and policies adhere to medically accepted standards of care and avoid interfering with the doctor-patient relationship. Amici States' laws and policies result in better health outcomes for our transgender teens,

[1] Amici States submit this amicus brief pursuant to Federal Rule of Appellate Procedure 29(a) in support of Plaintiffs-Appellants and reversal of the denial of a preliminary injunction.

safeguard their physical, emotional, and financial well-being, protect their autonomy, and preserve the integrity and ethics of the medical profession.

Amici States also share a strong interest in the proper application of the Equal Protection Clause to protect transgender individuals throughout our nation from unconstitutional discrimination. Oklahoma's complete ban on gender-affirming care for minors violates equal protection. The challenged law, Senate Bill (SB) 613, treats cisgender minors differently from transgender minors, allowing cisgender minors to access certain medications while banning transgender minors from accessing the same. The ban thus singles out transgender minors for discriminatory treatment *because of* their gender nonconformity. Such treatment is discrimination based on sex. The lower court erred in reviewing the ban under rational basis review and denying the motion for a preliminary injunction. Transgender minors deserve, and are guaranteed, the equal protection of the law, as are all other persons under the Constitution. This Court should reverse.

## ARGUMENT

### I. RESTRICTING ACCESS TO GENDER-AFFIRMING MEDICAL CARE SIGNIFICANTLY HARMS TRANSGENDER MINORS

Denying medically necessary care to transgender teens harms their physical, emotional, and psychological health.[2] Many transgender teens suffer from gender dysphoria: the often debilitating distress and anxiety that can result from incongruence between a person's gender identity and sex at birth.[3] If unaddressed or untreated, gender dysphoria can affect quality of life and trigger decreased social functioning.[4] The symptoms of gender dysphoria, and the compounding

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[2] Oklahoma's ban not only harms its own residents, but also threatens amici States' residents who travel to Oklahoma for school, vacation, and work. Oklahoma's law, for example, could compel transgender teenagers who receive gender-affirming healthcare in amici States to discontinue their prescribed medications while in Oklahoma. Teens traveling to Oklahoma, even on a temporary basis, may lack access to gender-affirming medical care if they are hospitalized for an injury or need to refill a prescription. And amici States' residents working, visiting, and studying in Oklahoma, like college students and tourists, could be forced to forgo necessary medical care to avoid the ban's effects.

[3] American Psychiatric Association, *Gender Dysphoria*, in Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2022); *see also What is Gender Dysphoria?*, American Psychiatric Association (Aug. 2022), https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria.

[4] *See* Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15(9) Quality of Life Research 1447 (2006), https://www.ncbi.nlm.nih.gov/pubmed/16758113 (observing that transgender men who received transition-related care reported having a higher health-related quality of life than those who had not).

effects of societal discrimination, can also be fatal. Among transgender people, suicide attempts are nine times more common than in the overall U.S. population (41% versus 4.6%).[5] The risks are especially high among transgender minors.[6] One study found that 56% of transgender minors reported a previous suicide attempt and 86% reported suicidal thoughts.[7]

Access to gender-affirming healthcare and other medical interventions that improve mental health are thus especially important

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[5] Ann P. Haas et al., Am. Found. *For Suicide Prevention & The Williams Inst., Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2* (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-GNC-Suicide-Attempts-Jan-2014.pdf.

[6] *See, e.g.*, Ali Zaker-Shahrak et al., Cal. Dep't of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (2012), https://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf ("A recent systematic review of largely American samples gives a suicide attempt rate of approximately one in every three individuals with higher rates found among adolescents and young adults.").

[7] Ashley Austin et al., *Suicidality Among Transgender Youth: Elucidating the Role of Interpersonal Risk Factors*, 37 J. of Interpersonal Violence 2696 (2020), https://journals.sagepub.com/doi/10.1177/0886260520915554.

to transgender teenagers. A 2021 analysis found that, for teens under the age of eighteen, use of gender-affirming hormone therapy was associated with lower odds of recent depression and lower odds of attempting suicide compared to adolescents who wanted, but did not receive, such therapy.[8] Another study reflected that, for teenagers and young adults ages thirteen to twenty, receiving gender-affirming care, including puberty blockers and gender-affirming hormones, was associated with 60% lower odds of moderate or severe depression and 73% lower odds of having suicidal thoughts over a twelve-month follow-up.[9] A survey of nearly 3,500 transgender adults revealed that individuals who received pubertal suppression healthcare during adolescence had nearly 20 percent lower odds of lifetime suicidal thoughts compared to individuals who wanted this treatment but did

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[8] Amy E. Green et al., *Association of Gender-Affirming Hormone Therapy with Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. Adolescent Health 643, 647–48 (2022), https://doi.org/10.1016/j.jadohealth.2021.10.036.

[9] Diana M. Tordoff, et al., *Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care*, 5 J. Am. Med. Ass'n Network Open 1, 6 (2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423.

not receive it.[10] A longitudinal study that followed transgender adolescents from their intake at a gender clinic into young adulthood reported that gender-affirming treatment resulted in significant improvement in global functioning and psychological well-being and the participants' life satisfaction, quality of life, and subjective happiness were comparable to their cisgender peers.[11] Another study found significant improvement in teens' sense of self-worth after starting hormone therapy.[12] In short, removing discriminatory barriers to healthcare improves health outcomes for our transgender residents, especially teenagers.

Conversely, studies reflect that withholding gender-affirming

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[10] Jack L Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 Pediatrics no. 2 at 1, 5 (2020), https://doi.org/10.1542/peds.2019-1725 (percentage calculated from odds ratio).

[11] Annelou L.C. de Vries et al., *Young Adult Psychological Outcome After Puberty Suppression and Gender Reassignment*, 134 Pediatrics no. 4 at 696, 702 (2014), https://doi.org/10.1542/peds.2013-2958.

[12] Marijn Arnoldussen et al., *Self-Perception of Transgender Adolescents After Gender-Affirming Treatment: A Follow-Up Study Into Young Adulthood*, 9 LGBT Health no. 4 at 238, 242-244 (2022), https://www.liebertpub.com/doi/epdf/10.1089/lgbt.2020.0494.

treatment can have significant negative effects on teens' psychological well-being, psychosocial development, and quality of life. For transgender adolescents, being forced to endure puberty that does not align with their gender identity is "often a source of significant distress."[13] Delaying treatment also imposes harms. A 2020 study reflected that adolescents who begin gender-affirming treatment at later stages of puberty are five times more likely to be diagnosed with depression and four times more likely to have anxiety disorders than adolescents who seek treatment in early puberty.[14]

## II. AMICI STATES' LAWS AND POLICIES PROMOTE ACCESS TO GENDER-AFFIRMING MEDICAL CARE BASED ON ESTABLISHED MEDICAL STANDARDS

In light of the adverse consequences that arise when transgender individuals are deprived of access to medically necessary healthcare,

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[13] Ximena Lopez et al., *Statement on Gender-Affirmative Approach to Care from the Pediatric Endocrine Society Special Interest Group on Transgender Health*, 29 Current Op. Pediatrics no. 4 at 475, 480 (2017), https://pubmed.ncbi.nlm.nih.gov/28562420.

[14] *See* Julia C. Sorbara et al., *Mental Health and Timing of Gender-Affirming Care*, 146 Pediatrics no. 4 at 1, 5-6 (2020), https://publications.aap.org/pediatrics/article/146/4/e20193600/79683/Mental-Health-and-Timing-of-Gender-Affirming-Care (reporting odds ratios).

many amici States have enacted laws and regulations to ensure that their residents, including transgender teenagers, have access to gender-affirming healthcare.[15] These laws promote sound medical practices and increase equity in healthcare. Beyond these general protections, some amici States have issued explicit guidance prohibiting insurers from denying minors treatment for gender dysphoria solely based on age, in recognition of the importance of gender-affirming interventions for this vulnerable population. For instance, Oregon has codified its prohibition on insurance plans denying benefits on the basis of gender identity and, in 2015, Oregon approved puberty suppression coverage under its Medicaid program for beneficiaries who are 15 or older.[16] Washington's Medicaid program explicitly covers puberty suppression therapy and hormone therapy for those under age twenty. Wash. Admin. Code §§ 182-531-1675(b)(i)–(ii), (f). Similarly, New York's Medicaid

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[15] *See generally Equality Maps: Healthcare Laws and Policies*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Nov. 7, 2023).

[16] *See* Or. Rev. Stat. § 746.021; Or. Health Auth., *Prioritized List: Guideline for Gender Dysphoria* 1 (2019), https://www.oregon.gov/oha/HPA/DSI-HERC/FactSheets/Gender-dysphoria.pdf.

regulations require coverage for medically necessary puberty suppression for patients who meet eligibility criteria and medically necessary hormone therapy for individuals who are sixteen years of age and older. N.Y. Comp. Codes R. & Regs. tit. 18 § 505.2(*l*)(2)(i).

In contrast to Oklahoma's categorical ban on gender-affirming care for minors, amici States' policies also recognize that best medical practices require an *individualized* assessment to determine whether—and to what extent—gender-affirming care is medically necessary for an individual patient. For example, the District of Columbia has instructed that determinations of "medical necessity" for insurance coverage purposes "must also be guided by providers in communication with individual patients."[17] Washington forbids insurers from "deny[ing] or limit[ing] coverage for gender affirming treatment" when it is "medically necessary" and "prescribed in accordance with accepted

[17] Chester A. McPherson, D.C. Dep't of Ins., Bulletin 13-IB-01-30/15, *Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression* 1, 4 (2014), https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf.

standards of care."[18] And California encourages health insurance companies to evaluate coverage criteria for gender-affirming care in order "to avoid needlessly delaying and interfering with medical care recommended by a patient's doctor."[19]

Taken together, these laws and policies reflect amici States' core commitment to preserving the integrity of the medical profession, protecting the equality of all people, regardless of their gender identity, and ensuring that people with gender dysphoria are not denied medically necessary healthcare.

## III. THE BAN VIOLATES THE EQUAL PROTECTION CLAUSE

SB 613 prohibits transgender teenagers from obtaining medically necessary care that cisgender teenagers are permitted to receive. Accordingly, the statute is subject to heightened scrutiny because it expressly classifies on the basis of sex and transgender status (which is a form of sex-based discrimination). The lower court's conclusion that

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[18] Wash. Rev. Code § 48.43.0128(3)(a) (2019).

[19] Press Release, Cal. Dep't of Ins., *Commissioner Lara Takes Proactive Step to Ensure Transgender Youth Have Access to Gender-Affirming Medical Care for Gender Dysphoria* (Dec. 30, 2020), https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release140-2020.cfm.

SB 613 neither imposes a sex-based classification nor enforces gender conformity is inconsistent with the text of the statute and the weight of federal authority applying these concepts to equal protection claims.[20]

### A. Heightened Scrutiny Applies

The district court erred in evaluating SB 613 under rational basis review. According to the district court, SB 613 "is precisely the type of age-based legislative decision that courts have long accepted as being subject to rational basis review." *Poe v. Drummond*, No. 23-CV-177-JFH-SH, 2023 WL 6516449, at *5 (N.D. Okla. Oct. 5, 2023). Although SB 613 explicitly draws distinctions using terms such as "sex" and "gender," the district court held 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.* The district court

[20] *See, e.g.*, *M.C. ex rel. A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020); *Brandt ex. rel. Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022); *Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023); *Doe v. Ladapo*, No. 4:23-cv-114-RH-MAF, 2023 WL 3833848 at *8 (N.D. Fla. June 6, 2023). Some courts, however, have recently taken a different approach. *See Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1227 (11th Cir. 2023) (applying rational basis review and vacating preliminary injunction); *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 486, 491 (6th Cir. 2023) (applying rational basis review and reversing preliminary injunction).

found that SB 613 "does not use sex as a means to distinguish between groups" because "*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 *6 (emphasis in original). Finally, the district court held that SB 613 does not "further a particular gender stereotype or prohibit conduct that contravenes that stereotype." *Id.* at *7. The district court's conclusions cannot be squared with the plain language of the statute and longstanding equal protection doctrine. We address each contention in turn.[21]

First, although SB 613 classifies based on age, it also imposes impermissible sex-based classifications. The statute does not ban

[21] The district court also asserted that an "initial obstacle" to the relief that Plaintiffs seek was that they failed to argue that the "original fixed meaning" of the Equal Protection Clause covered their claims. *Poe v. Drummond*, 2023 WL 6516449 at *3. However, as discussed *infra*, SB 613 classifies individuals on the basis of sex and transgender status by prohibiting only transgender minors, and not any other minors, from accessing certain medical care. For more than half a century, the Supreme Court has struck down laws and policies that discriminate on the basis of sex as violations of the Equal Protection Clause. *See, e.g.*, *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that an Idaho law that gave preference to men over women as administrators of estates violated the Equal Protection Clause); *United States v. Virginia*, 518 U.S. 515, 534 (1996) (excluding women from a military academy violated the Equal Protection Clause).

medical care across the board for all minors. It only bans certain medical procedures when they are "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." SB 613, § 1(A)(2)(a) (emphasis added). For example, surgeries are barred only when they seek to alter or remove "features that are typical for the individual's biological sex." *Id.* Puberty blockers and hormone therapy are illegal only when they are prescribed to promote the development of features "consistent with the opposite biological sex." *Id.* These same treatments remain legal for minors to treat conditions such as precocious puberty, polycystic ovarian failure, intersex conditions, and cancer.

These sex-based distinctions drawn by SB 613 do not neutrally describe the medical treatment at issue. On the contrary, the statute bans certain procedures only when they are performed for one specific purpose: gender transition. Medical providers must therefore know the patient's sex at birth and the purpose of the treatment to know whether the treatment is lawful. In other words, "without sex-based classifications, it would be impossible for [the statute] to define whether

a puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted)." *K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086 (S.D. Ind. 2023), at *8; *see also Brandt ex. rel. Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (holding that "because the minor's sex at birth determines whether or not the minor can receive certain types of medical care" the ban on gender-affirming care "discriminates on the basis of sex" and is subject to heightened scrutiny); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (applying heightened scrutiny because "the School District's policy cannot be stated without referencing sex, as the School District decides which bathroom a student may use based upon the sex listed on the student's birth certificate"), *abrogated on other grounds by Ill. Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020); *accord A.C. ex rel. A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023) (applying *Whitaker* in an equal protection case involving discrimination against transgender students). The text of SB 613 therefore expressly classifies based on sex.

Second, the district court ignored the express language of the statute in concluding that SB 613 does not "use gendered terms to distinguish between groups of people" and applies to "all minors, regardless of sex." *Poe v. Drummond*, 2023 WL 6516449, at *6. SB 613 prohibits certain procedures only when the treatment is sought by a teenager whose gender identity does not conform to the teenager's sex at birth. The healthcare ban is therefore *not* equally applicable to all minors. Rather, it treats cisgender and transgender teenagers differently by permitting certain medications for the former while categorically banning the same medications for the latter. It is beyond dispute that one group—and only one group—pursues the "gender transition procedures" that Oklahoma has criminalized: transgender individuals. SB 613's classifications target transgender people on the basis of their sex, even if the ban does not expressly use the word "transgender." *See, e.g.*, *Ladapo*, 2023 WL 3833848, at *9 (N.D. Fl. June 6, 2023) (explaining that to know whether prescribing puberty blockers is legal or illegal, "one must know whether the child is cisgender or transgender. The treatment is legal if the child is cisgender but illegal if

the child is transgender because the statute prohibits [puberty blockers] only for transgender children, not for anyone else.").

Such "discrimination on the basis of transgender status is a form of sex-based discrimination" for purposes of an equal-protection claim. *Hecox*, 79 F.4th 1009, 1026 (9th Cir. 2023). Indeed, only transgender individuals seek gender-affirming care, and banning medical care because transgender individuals seek it is discriminatory. *See Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011) (holding that discrimination against transgender individuals on the basis of gender stereotypes "is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause"); *Whitaker*, 858 F.3d 1034, 1051 (7th Cir. 2017) (applying heightened scrutiny where a school district "treats transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently").

The Supreme Court recognized that discrimination against transgender individuals is necessarily a form of sex-based discrimination in *Bostock v. Clayton County*. In that case, the Court explained that, in the context of a Title VII claim, "it is impossible to

discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton Cnty., Georgia*, 140 S.Ct. 1731, 1741 (2020). In other words, "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." *Id.* This Court, too, has recognized that "in the wake of *Bostock*, it is now clear that transgender discrimination . . . is discrimination 'because of sex' prohibited under Title VII." *Tudor v. Se. Oklahoma State Univ.*, 13 F.4th 1019, 1028 (10th Cir. 2021). Here, a similar analysis reveals that SB 613 imposes differential treatment on the basis of sex: change the minor's sex at birth to yield a different result, *e.g.*, a cisgender young man can receive testosterone to initiate male puberty but a transgender young man cannot. Such discriminatory treatment of transgender teenagers warrants heightened scrutiny under the Equal Protection Clause. *See Hecox*, 79 F.4th at 1022–26.[22]

[22] The district court also pointed to *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), to support its view that "'regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretex[t] designed to effect an invidious discrimination against members of one

Third, the district court's insistence that SB 613 "does not further gender stereotypes by taking adverse action against those who fail to conform to them" is not persuasive. *Poe v. Drummond*, 2023 WL 6516449, at *7; *see also id.* (claiming that SB 613 does not "prohibit conduct that contravenes that stereotype"). By its express terms, SB 613 conditions the availability of particular medical procedures on an individual conforming to sex stereotypes. The statute bans surgeries that alter or remove features that are "*typical for* the individual's biological sex." SB 613, § 1(A)(2)(a)(1) (emphasis added). It outlaws prescribing puberty blockers and hormones to minors when those treatments would cause them to develop features "*consistent with* the opposite biological sex." *Id.* at § 1(A)(2)(a)(2) (emphasis added). The

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sex or the other.'" *Poe v. Drummond*, 2023 WL 6516449, at *8 (quoting *Dobbs*, 142 S.Ct. at 2245–46). But unlike these contexts, SB 613 facially discriminates on the basis of sex by prohibiting medical procedures "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*." SB 613, § 1(A)(2)(a) (emphasis added). Because SB 613 explicitly bans certain medical treatments for transgender minors, but not for cisgender minors, it is "designed to effect an invidious discrimination" on the basis of transgender status and therefore on the basis of sex.

phrases "typical for" and "consistent with" are textbook examples of classifying, and requiring conformity with, characteristics that are viewed as stereotypically male or female. SB 613 forbids transgender teenagers from aligning their physical features with their gender identity by outlawing medical treatment that would alleviate their gender dysphoria. Prohibiting "gender transition procedures" inherently prohibits conduct that departs from what it means to be male or female and from how a male or female should look. *See Bostock*, 140 S.Ct. at 1741.

This Court should join the Fourth, Seventh, and Ninth Circuits, which "have held that various forms of discrimination against transgender individuals constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes." *Hecox*, 79 F.4th at 1026 (internal citations omitted); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (Plaintiff "was subjected to sex discrimination because he was viewed as failing to conform to the sex stereotype propagated by the Policy"); *Whitaker*, 858 F.3d at 1051.

For all of these reasons, by its express terms, SB 613 facially discriminates against transgender persons on the basis of sex and gender nonconformity. But if this Court is inclined to agree with the district court that SB 613 is "facially neutral," *Poe v. Drummond*, 2023 WL 6516449, at *6, the Court should hold that Oklahoma has engaged in "proxy discrimination" against transgender individuals, despite classifying on the basis of seemingly facially neutral criteria. "In a case of proxy discrimination the defendant discriminates against individuals on the basis of criteria that are almost exclusively indicators of membership in the disfavored group." *Pac. Shores Properties, LLC*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). Courts have found that laws and policies with "seemingly neutral criteria that are so closely associated with [a] disfavored group," *id.*, discriminate by proxy on the basis of religion, race, sex, disability, and age. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Davis v. Guam*, 932 F.3d 822, 839 (9th Cir. 2019) (statute limiting voting to "Native Inhabitants of Guam" served as a proxy for race); *McWright v. Alexander*, 982 F.2d 222, 228

(7th Cir. 1992) (excluding service dogs or wheelchairs is a proxy for disability).

SB 613 discriminates by proxy against transgender individuals because—in the words of the district court—it "restrict[s] a specific course of treatment that only transgender individuals would normally request." *Poe v. Drummond*, 2023 WL 6516449, at *8. *Hecox* is instructive. There, the Ninth Circuit analyzed a law banning the participation of transgender women and girls in women's student athletics. *Hecox*, 79 F.4th at 1015. The Court explained how the law's "specific classification of 'biological sex'" was "carefully drawn to target transgender women and girls, even if it does not use the word 'transgender' in the definition." *Id.* at 1025; *see also id.* at 1043 (Christen, J, concurring in part and dissenting in part) (concluding that the law "can only be understood as a transgender-based classification" because it "uses a technically neutral classification—biological sex—as a proxy to evade the prohibition of intentional discrimination") (citing *McWright*, 982 F.2d at 228).

So too here. SB 613's classifications concern "gender transition procedures," SB 613, § 1(B), which target transgender—and only

transgender—people. Oklahoma thus cannot credibly assert that its law does not facially discriminate on the basis of transgender status. Such a claim is belied by the complete overlap between the banned procedures (gender transition) and the targeted group (transgender individuals). By definition, cisgender individuals do not seek to transition their gender, and therefore no cisgender person will be subject to the ban, even though they may receive the same medical treatment that is banned for their transgender peers.[23] By banning certain treatments for a medical purpose that only transgender individuals would pursue, Oklahoma facially (and by proxy) discriminates against transgender individuals on the basis of sex and gender nonconformity. *See Hecox*, 79 F.4th at 1025.

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[23] Although SB 613 targets only transgender minors, it does not affect all transgender minors. Not all transgender minors suffer from gender dysphoria, and not all individuals suffering from gender dysphoria seek to medically transition. But the fact that SB 613 does not discriminate against all transgender minors is no defense. "[A] law is not immune to an equal protection challenge if it discriminates only against some members of a protected class but not others." *Hecox*, 79 F.4th at 1025 (internal citations omitted); *see also Nyquist v. Mauclet*, 432 U.S. 1, 7-9 (1977) (invalidating New York law which barred some, but not all, immigrants from accessing state financial assistance for higher education).

### B. The Ban Does Not Satisfy Heightened Scrutiny

The district court concluded that SB 613 is rationally related to several legitimate state interests, including state governments' "abiding interest 'in protecting the integrity and ethics of the medical profession,' and 'preserving and promoting the welfare of the child.'" *Poe v. Drummond*, 2023 WL 6516449, at *13 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) and *Schall v. Martin*, 467 U.S. 253, 265 (1984)). As detailed above, *supra* Section III.A, the district court erred in holding that rational basis review applies because SB 613 classifies based on transgender status and therefore on the basis of sex, and thus must withstand heightened scrutiny.[24]

For a gender-based classification to withstand heightened scrutiny, it must "serve important governmental objectives," and "the

[24] Although heightened scrutiny applies, at least one court has concluded on a similar record that a blanket ban of all gender-affirming medications for all transgender minors—regardless of their individual circumstances and in conflict with well-established medical standards—is not rationally related to a legitimate government interest. *See, e.g.*, *Ladapo*, 2023 WL 3833848, at *10 ("The State of Florida's decision to ban the treatment is not rationally related to a legitimate government interest."); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (applying rational basis review and concluding that

discriminatory means employed must be substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). In other words, there must be a "close means-end fit." *Sessions v. Morales-Santana*, 582 U.S. 47, 68 (2017).

Oklahoma's specific "means"—a categorical ban of gender-affirming medical care for minors—do not fit its proffered "end" of protecting minors and regulating the medical profession. Plaintiffs have presented evidence of risks to minors' health and well-being from denying gender-affirming care, including prolonging their gender dysphoria and causing additional distress and health risks, such as depression, posttraumatic stress disorder, and suicidality.[25] Under a close means-end analysis, Oklahoma's potential interest in *some* regulation of gender transition procedures for minors is not adequate to

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City's proffered justification for disparate treatment of class violated Equal Protection Clause because it "rest[ed] on irrational prejudice").

[25] Brief for Plaintiffs-Appellants at 5–8, Poe v. Drummond, No. 23-5110 (10th Cir. Nov. 9, 2023). The district court does not wholly reject this evidence. Rather, it agrees there is an "ongoing thoughtful debate" on the issue of gender-affirming care for minors. *Poe v. Drummond*, 2023 WL 6516449, at *13.

justify SB 613's wholesale prohibition of gender transition procedures for minors. *See Morales-Santana*, 582 U.S. at 68.

As amici States' experience demonstrates, SB 613 fails to satisfy this close means-end fit because there are many ways to effectively regulate—rather than outright ban—gender transition procedures for minors.[26] Our preexisting state-level safeguards have proven adequate and effective in guarding against improper medical practices. Like Oklahoma, amici States regulate medical practice through laws and regulations that prohibit abusive, unethical, or medically improper conduct. *See, e.g.*, Okla. Stat. tit. 59, §§ 503, 509 (establishing the medical board's power to regulate the practice of medicine, including when a provider has prescribed or administered a drug or treatment without sufficient examination and/or not in a safe, medically accepted

[26] The district court also states that "federal courts must resist the temptation to invoke an unremunerated guarantee to 'substitute' their views for those of legislatures." *Poe v. Drummond*, 2023 WL 6516449, at *13 n.18 (quoting *L.W.*, 84 F.4th at 472–73). But, as other courts have observed, legislative deference is not absolute, especially "when heightened scrutiny applies to an equal protection claim." *K.C. v. Individual Members of the Medical Licensing Board of Indiana*, 2023 WL 4054086, at *11.

manner).[27] Violation of the code of conduct set forth in a medical practice act can result in a State's medical board suspending or revoking a provider's medical license. *See, e.g.*, Okla. Stat. tit. 59 § 509.1.[28] Given the authority that Oklahoma's medical board already possesses, a categorical ban on well-established medical treatment is not substantially related to Oklahoma's purported goal of regulating the medical profession.

Any legitimate concerns about the risks that may be presented by some forms of gender-affirming care can be addressed through ordinary regulatory methods. For example, States did not react to the opioid crisis by completely banning the use of opioids and depriving all patients of medications to manage their pain. Instead, States adopted legislation or regulations to limit the amount of opioids that physicians

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[27] *See also, e.g.*, Cal. Bus. & Prof. Code § 2000 *et seq.*; D.C. Code § 3–1205.14; 225 Il. Comp. Stat. 60/22(A); Mass. Gen. Laws ch. 112, § 5; Md. Code Ann., Health Occ. § 14-101 *et seq.*; Nev. Rev. Stat. §§ 630.301, 630.306, 630.230; N.Y. Educ. Law § 6530; 63 Pa. Cons. Stat. § 422.1 *et seq.*; Wash. Rev. Code § 18.71.002 *et seq.*

[28] *See also, e.g.*, Cal. Bus. & Prof. Code § 2220 *et seq.*; D.C. Code § 3–1205.14; 225 Il. Comp. Stat. 60/22(A); Mass. Gen. Laws ch. 112, § 5; Md. Code Ann., Health Occ. § 14-404; Nev. Rev. Stat. § 630.352(4); N.Y. Pub. Health Law § 230-a; 63 Pa. Cons. Stat. § 422.41; Wash. Rev. Code § 18.130.050 *et seq.*

could prescribe and disciplined providers who engaged in improper prescribing practices.[29]

Amici States' experience also confirms that a categorical ban on gender-affirming care is not substantially related to a concern about the medical risks of receiving such care. As our laws and guidance reflect, gender-affirming care is well-established, evidence-based medical treatment.[30] For example, New York, Oregon, and Rhode Island's

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[29] Nat'l Conf. of State Legislatures, *Prescribing Policies: States Confront Opioid Overdose Epidemic* (June 30, 2019), https://www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx [https://web.archive.org/web/20220426122124/www.ncsl.org/research/health/prescribing-policies-states-confront-opioid-overdose-epidemic.aspx] (archived Apr. 26, 2022) ("State lawmakers are crafting innovative policies . . . to address this public health crisis while also ensuring appropriate access to pain management.").

[30] Many States have relied on prevailing professional standards of care set forth by nationally recognized medical experts in crafting laws and guidance on coverage of gender-affirming medical care to treat gender dysphoria. *See, e.g.*, Mass. Comm'r of Ins., Bulletin 2021-11, *Continuing Applicability of Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Gender Dysphoria Including Medically Necessary Gender Affirming Care and Related Services* at 2 (2021), https://www.mass.gov/doc/bulletin-2021-11-prohibited-discrimination-on-the-basis-of-gender-identity-or-gender-dysphoria-including-medically-necessary-gender-affirming-care-and-related-services-issued-september-9-2021/download (recommending insurance carriers "consult the most up-to-date medical standards set forth by nationally recognized medical experts in the transgender

insurance guidelines cover gender-affirming care, explicitly identifying the importance of adhering to scientific evidence and prevailing professional standards.[31] The World Professional Association for Transgender Health (WPATH), the Endocrine Society, and other recognized and reputable professional associations endorse evidence-

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health field, including but not limited to those issued by the [WPATH]"); Wash. Rev. Code § 48.43.0128(3)(a) (forbidding insurers from "deny[ing] or limit[ing] coverage for gender-affirming treatment" when it is medically necessary and "prescribed in accordance with accepted standards of care").

[31] N.Y. Dep't of Fin. Servs., *Ins. Circular Letter No. 7* (Dec. 11, 2014), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2014_07 (citing the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders' recognition of gender dysphoria); Or. Health Auth., *Prioritized List: Guideline for Gender Dysphoria: Frequently Asked Questions* (last updated Mar. 2019), https://www.oregon.gov/oha/HPA/DSI-HERC/FactSheets/Gender-dysphoria.pdf (approving youth puberty suppression coverage based on extensive testimony "from experts at various public meetings," "reviewing relevant evidence and literature," and citing WPATH standards); R.I. Off. of the Health Ins. Comm'r, Health Ins. Bulletin 2015-3, *Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity or Expression* (Nov. 2015), http://www.ohic.ri.gov/documents/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf ("[A] growing body of scientific and clinical evidence regarding the potential harm to consumers arising from the denial or exclusion of services on the basis of gender identity" prompted reexamination of exclusions.).

based standards of care for transgender people.[32] And while gender-affirming medical care, like all medical treatments, can carry both risks and benefits, those concerns are appropriately addressed on a case-by-case basis through consultation among treating providers, patients, and their families. A flat ban on gender-affirming care for teenagers—even in cases when doctors deem such care to be medically necessary—is inconsistent with those well-established medical standards and practices.[33]

Oklahoma's ban also oversteps by unnecessarily interfering with the doctor-patient relationship. According to the American Medical Association's Code of Medical Ethics, the relationship between a patient and a physician is based on trust, "which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's

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[32] *See* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, version 8*, 23 Int'l J. Transgender Health S1 (2022), https://doi.org/10.1080/26895269.2022.2100644; *see also* Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender Incongruent-Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. Clinical Endocrinology & Metabolism 3869 (2017), https://doi.org/10.1210/jc.2017-01658.

[33] *See id.*

own self-interest or obligations to others, to use sound medical judgment on patients' behalf, and to advocate for their patients' welfare."[34] Courts have recognized the significance of this relationship.[35] And amici States' policies explicitly avoid interfering with the doctor-patient relationship and disrupting decisions rooted in well-accepted medical standards.[36] In short, Oklahoma's ban

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[34] *Patient-Physician Relationships*, AMA Code of Medical Ethics, https://code-medical-ethics.ama-assn.org/ethics-opinions/patient-physician-relationships (last visited Sept. 22, 2023).

[35] *See, e.g.*, *Doe 1 v. Thornbury*, No. 3:23-cv-230-DJH, 2023 WL 4230481, at *5 (W.D. Ky. June 28, 2023), *rev'd*, *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460; *Doe v. Ladapo*, 2023 WL 3833848, at *13 (N.D. Fla. June 6, 2023) ("Ordinarily it is the patient, in consultation with the doctor, who weighs the risks and benefits and chooses a course of treatment. What is remarkable about the challenged statute and rules is not that they address medical treatments with both risks and benefits but that they arrogate to the state the right to make the decision."); *Brandt v. Rutledge*, 551 F.Supp.3d 882, 891 (E.D. Ark. 2021) ("[T]he State's goal of ensuring the ethics of Arkansas healthcare providers is not attained by interfering with the patient-physician relationship, unnecessarily regulating the evidence-based practice of medicine[,] and subjecting physicians who deliver safe, legal, and medically necessary care to civil liability and loss of licensing.").

[36] *See, e.g.*, McPherson, *supra* note 17, at 3–4 (determinations of "medical necessity" for insurance coverage purposes "must also be guided by providers in communication with individual patients."); Press Release, Cal. Dep't of Ins., *supra* note 19 (the State encourages health insurance companies to evaluate coverage criteria for gender-affirming

undermines the practice of medicine, the doctor-patient relationship, and the integrity of the medical profession.

For the above reasons, SB 613 does not withstand heightened scrutiny.

## CONCLUSION

The denial of the preliminary injunction should be reversed.

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care in order "to avoid needlessly delaying and interfering with medical care recommended by a patient's doctor.").

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## CORPORATE DISCLOSURE STATEMENT

As governmental parties, amici are not required to file a certificate of interested persons. Fed. R. App. P. 26.1(a).

## CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6060 words.

2. I certify that this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century font. Fed. R. App. P. 32(g)(1).

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## CERTIFICATE OF SERVICE

I certify that on November 16, 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to any CM/ECF participants.

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